

Supreme Court, U.S.
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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS,
ROBERT M. GREEN, WILLIAM A. LANE, JR.,
JAMES B. McINTOSH, FREDERICK H. SCHROEDER,
JOHN W. YORK and JACK H. QUARITIUS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari Filed: September 19, 1979
Writ of Certiorari Granted: November 26, 1979

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Relevant Docket Entries

1. December 13, 1974: Original Complaint filed.
 2. April 14, 1976: Affidavit of Arthur Milam filed.
 3. April 15, 1976: Respondents' Amended Complaint filed.
 4. May 5, 1976: Petitioner's Amended Answer filed.
 5. July 28, 1976: District Court Memorandum Opinion and Order.
 6. August 26, 1976: Notice of Appeal filed.
 7. July 18, 1979: Circuit Court of Appeals' Opinion and Judgment.
 8. July 3, 1979: Motion for Rehearing *En Banc* in the Circuit Court of Appeals filed.
 9. August 1, 1979: Order Overruling Motion for Rehearing *En Banc*.
 10. August 15, 1979: Stay of Mandate in the Circuit Court of Appeals filed.
 11. September 19, 1979: Petition for Writ of Certiorari filed.
 12. October 25, 1979: Brief in Opposition filed.
 13. November 26, 1979: Petition for Writ of Certiorari granted.

Relevant Pleadings

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

LAWRENCE F. LEE, JR., BERT A.
BETTS, ROBERT M. GREEN,
WILLIAM A. LANE, JR., JAMES
B. MCINTOSH, FREDERICK H.
SHROEDER, JOHN W. YORK,
JACK H. QUARITIUS

Plaintiffs

§ § § § § § § § § §

V

NAVARRO SAVINGS ASSOCIATION

Defendant.

FIRST AMENDED ORIGINAL COMPLAINT

The above-named Plaintiffs, Trustees of Fidelity Mortgage Investors, a Massachusetts business trust (hereinafter "FMI" or "Plaintiff"), complain of Defendant Navarro Savings Association as follows. The above-named Plaintiffs are individuals, all of whom are residents and citizens of states other than the State of Texas. They bring this action in their capacity as Trustees of FMI or only, in the event that

this Court finds that with Plaintiffs bringing this action in their capacity as trustees this Court lacks subject matter jurisdiction over this cause, as representatives of FMI and the owners of shares of FMI of whom there are approximately 9500. As such representatives, they will fairly and adequately protect the interests of FMI and the owners of shares therein. Defendant Navarro Savings Association is a corporation incorporated under the laws of the State of Texas having its principal place of business in the State of Texas. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000. This Court has jurisdiction of this action under the provisions of Title 28, U.S.C., §1332.

Additionally, on January 31, 1975, an order was entered by the Federal District Court of the Southern District of New York in a Chapter XI Bankruptcy Proceeding styled *In Re Fidelity Mortgage Investors, Debtors*, Bankruptcy No. 75-B-54, by which order FMI was authorized as debtor-in-possession to operate its business and manage its properties through specifically listed trustees under the supervision of the Bankruptcy Court. This Court therefore has jurisdiction of this matter under §23 of the Federal Bankruptcy Act, 11 U.S.C. 146.

Additionally, the claims hereinafter asserted constitute, by the use of interstate commerce and the mail fraud, untrue statements, and deceit in connection with purchase and sale of a security, in violation of §10b of the Securities Exchange Act of 1934, 15 U.S.C. §78l (b) (1970) and its implementing Rule 10b-5, 17 C.F.R. §240.10b-5 (1975) and Plaintiffs or their beneficiaries have suffered damages as a result thereof in excess of \$10,000.00, exclusive of interest and costs. This Court has jurisdiction of this claim under the provisions of Title 28, U.S.C., §1331, and this Court also

therefore has pendent jurisdiction over all claims alleged hereunder arising under or based on state law.

COUNT ONE

I.

On or about September 9, 1971, William Lee Folse, acting as president of Rockwall Estates, Inc., executed on behalf of Rockwall Estates, Inc., a promissory note to Plaintiff in the amount of \$850,000, and such amount of money was lent by Plaintiff to Rockwall Estates, Inc. A true and correct copy of the promissory note is attached hereto as Exhibit A and incorporated herein for all purposes.

II.

Prior to or contemporaneously with the execution of the above-described note, Defendant Navarro, acting through its president James W. McPherson, executed commitment letters dated July 26, 1971, the last of which was accepted by William Lee Folse on behalf of Rockwall Estates, Inc., on September 9, 1971. True and correct copies of these two commitment letters are attached hereto as Exhibits B and C. By these "takeout" commitments, Defendant Navarro agreed to loan to Rockwall Estates, Inc., \$850,000 at any time between September 8, 1973, and August 31, 1974, so that such sum could be used by Rockwall Estates, Inc., to pay to Plaintiff the sums due under the note to them. (Exhibit A)

III.

On or about August 5, 1971, James W. McPherson, acting as president and agent and representative of Navarro

Savings Association, sent to FMI, through Mr. Ronald L. Langley, for its advisers a letter agreement, a true and correct copy of which is attached hereto and incorporated herein for all purposes as Exhibit D.

VI.

On or about September 9, 1971, at the closing of the loan by FMI to Rockwall Estates, Inc., James W. McPherson, President of Defendant, actually or apparently on its behalf executed and delivered the documents copied as Exhibits B and C and orally stated to FMI's representative that the commitment fee had been actually received by Defendant.

V.

William Lee Folse, again acting as president of Rockwall Estates, Inc., assigned in writing the said commitment letters and the obligations of Defendant Navarro described therein to Plaintiff. A copy of this written assignment is attached hereto as Exhibit E and is incorporated herein for all purposes. Plaintiff FMI relied upon this assignment and the commitment letters being assigned and would not have loaned \$850,000 to Rockwall Estates, Inc., without the benefit of the assignment of the commitment by Navarro and the takeout provisions therein.

VI.

In reasonable reliance upon the documents copied and attached hereto as Exhibits B, C, D, and E, and the promises, agreements, statements, and representations stated therein, and made to FMI at the closing on such date, on or about September 9, 1971, the Plaintiff FMI lent to Rockwall Estates, Inc., the sum of \$850,000.

VII.

. In January of 1973 Rockwall Estates, Inc., had been more than sixty days delinquent in the payment of installments due on its loan to FMI, and, accordingly, FMI gave Defendant notice to make the loan covered by its commitment.

VIII.

Defendant breached its obligations under the commitment to make the loan in question or, in the alternative, anticipatorily breached its obligations in connection therewith. Consequently, as a result of such breach, Plaintiff foreclosed its Deed of Trust on the real estate securing the note to it by Rockwall Estates and, after the application of all credits and offsets due by reason thereof, Plaintiff suffered nevertheless damages and a deficiency in the amount of \$174,525.17 plus contractual interest and attorney's fees as provided in the applicable promissory note.

COUNT TWO

IX.

All of the preceding paragraphs in the Amended Original Complaint are incorporated herein for the purposes of this Count Two.

X.

In the alternative to the rights of Plaintiff as described in Count One above, Plaintiff would show the Court that it is, and was intended to be, a third party beneficiary of the commitment letters attached as Exhibits B and C, as was

well known to Defendant Navarro as well as to Rockwall Estates, Inc. In fact, the commitment letters specifically refer to the loan from FMI. Plaintiff altered its position in reliance upon the commitment letters in that it accepted the \$850,000 note of Rockwall Estates, Inc., and gave to Rockwall Estates, Inc., the proceeds of the note in reliance upon the commitment letters. The commitment letters were also made, in part, for the benefit of Plaintiff and were represented by the promisor, Navarro, to be a valid commitment.

XI.

Plaintiff has been damaged in the amount of \$174,525.17 plus interest and attorneys' fees as above described, by virtue of the failure of Navarro to perform under its commitment agreements.

COUNT THREE

XII.

Defendant Navarro held out James W. McPherson as its President and officer, permitted him to use its stationery, and at no time indicated to Plaintiff that he lacked any authority to perform the acts which he did perform. Plaintiff FMI relied upon this apparent authority and Defendant Navarro intended that such reliance be had and intended to induce Plaintiff to make the \$850,000 loan which it made to Rockwall Estates, Inc.

VIX.

If James W. McPherson lacked actual authority to execute the commitment letters and Exhibit D on behalf of

Defendant Navarro, or if the representations and promises in such documents or made at the closing of September 9, 1971, or prior thereto by such person were false, since Plaintiff FMI reasonably relied upon such representations and promises to its detriment, it has been defrauded by Defendant to its damages in the amount of \$174,525.17 plus interest and attorneys' fees as described above. Additionally, by reason of such fraud, Plaintiff is entitled to recover the sum of \$1,000,000 in punitive and exemplary damages.

THEREFORE, Plaintiff prays that the Defendant be summoned to appear and answer herein and that it recover its damages of \$174,525.17 plus interest and attorneys' fees, plus the sum of \$1,000,000 as punitive and exemplary damages, plus interests, costs of court, and general relief.

Respectfully submitted,

/s/ James A. Ellis, Jr.

Of CARRINGTON, COLEMAN,
SLOMAN, JOHNSON &
BLUMENTHAL
3000 One Main Place
Dallas, Texas 75250
214-741-2121

EXHIBIT A

PROMISSORY NOTE

\$850,000.00

Dallas, Texas
September 9, 1971

FOR VALUE RECEIVED, the undersigned, Rockwall Estates, Inc., (hereinafter sometimes referred to as "Maker"), hereby promises to pay to the order of Laurence F. Lee, Jr., Bert A. Betts, Roy B. Davis, Jr., N. Clement Slade, Jr., Robert M. Green, Luther H. Hodges, James B. McIntosh, Arthur W. Milam, Jack H. Quaritius, Frederick H. Schroeder and John W. York, not individually, but as Trustees of Fidelity Mortgage Investors, a Massachusetts Business Trust, under Declaration of Trust dated May 29, 1969 (hereinafter referred to as "FMI") and their respective successor Trustees under said Declaration of Trust, with power to protect, manage, sell, deliver, transfer, endorse with or without recourse, modify, extend, consolidate, coordinate and spread with any other note, negotiate, collect, discharge, accelerate, enforce and/or without being limited by any of the foregoing deal in any manner with this note, the obligations represented thereby, and exercise any right or option contained in this note, the principal sum of Eight Hundred Fifty Thousand and 00/100 (\$850,000.00) Dollars, or so much thereof that may be advanced, together with interest thereon from the date of advances on outstanding principal balance at the rate of five percent (5%) above the prime rate of interest charged by Morgan Guaranty Trust Company of New York, or its successors, on the business day preceding the first day of such successive month during the term hereof, but shall in no case be in

excess of one and one-half percent (1 1/2%) per month.

Interest hereon shall be due on the first day of each month for the preceding month (or the portion thereof following the date of this note), and shall be payable on or before the 15th of each month and at maturity. This note shall be in default if interest payments due on the first are not received by FMI by the 15th of each month, and upon such default this note shall bear interest at the rate of one and one-half percent (1 1/2%) per month from the first of the month in which such default occurs until payment of such interest due is received. The principal amount hereof shall be due and payable two years from the date hereof.

From time to time, without notice to any co-makers, endorsers or guarantors, this note may be extended or renewed in whole or in part and/or the rate of interest thereon may be changed or fees in consideration of loan extensions may be imposed and any related right or security thereof may be waived, exchanged, surrendered or otherwise dealt with and any of the actions mentioned in this note may be done, all without affecting the liability of the maker, co-makers and endorsers and guarantors, each of whom agrees to remain liable under this note until the debt represented hereby is actually paid in full to the holder. The release of any party liable upon or in respect of said note shall not release any other such party. Each of the guarantors, endorsers, co-makers and maker hereby waives presentment, demand or payment, protest and notice of non-payment and of protest and any and all other notices and demands whatsoever.

This note is secured by a Deed of Trust of even date herewith executed by the maker hereof and covering certain real property and improvements located in Rockwall County, Texas. It is expressly agreed that all of the covenants, conditions and agreements contained in said Deed of Trust and any Loan Commitment and/or Agree-

ment executed in connection therewith are hereby made part of this note.

To induce FMI to make the loan evidenced hereby, the undersigned represents and warrants that:

1. It is a corporation duly organized, validly existing and in good standing under the laws of Texas, has the power and authority to own its property and to carry on its business as now being conducted.

2. It is not in default under any provisions of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof or of any indenture or agreement to which it is a party or of any order, regulation, ruling or requirement of a court or public body or authority by which it is bound.

3. No action, suit or proceeding is pending or known to be threatened against it before any court or administrative agency which, by itself or taken together with other such litigation, involves a substantial amount not covered by insurance nor is any substantial basis for any such litigation known to exist.

4. The execution, delivery and performance of this note are within its corporate powers, have been duly authorized and do not violate any provision of law or of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof or of any indenture or agreement to which it is a party or of any order, regulation, ruling or requirement of a court or public body or authority by which it is bound.

5. It is not subject to any provision of its charter, other incorporation papers, by-laws or stock provisions or any amendment thereof, nor is it a party to any indenture or agreement, nor is it bound by any order, regulation, ruling or requirement of a court or public body or authority which will, under current or foreseeable conditions, materially adversely affect its normal operations or impair its financial

condition or prospects. No litigation is pending or known to be threatened against it which might have any such effect nor is any substantial basis for litigation known to exist.

6. The current balance sheet and the related statements of income and earned surplus, if any, heretofore delivered to FMI fairly and accurately represent the assets, liabilities, and financial condition and the results of its operations of and for the period covered thereby and have been prepared in accordance with generally accepted accounting principles applied on a basis consistently followed in all material respects throughout the period involved, and there are no contingent liabilities not disclosed thereby which involve a substantial amount. Since the date of such balance sheet, there has been no material adverse change in the assets, liabilities or financial conditions shown thereon.

7. It has good and marketable title to its properties and assets, including such properties and assets as are reflected in the balance sheet referred to in paragraph 6 above (except such assets as have been disposed of in the ordinary course of business subsequent to the date thereof).

8. All of its federal, state and other tax returns required by law to be filed have been filed, and all federal, state and other taxes, assessments and other governmental charges upon it or its properties which are due and payable have been paid. No federal income tax returns have been audited by the Internal Revenue Service for any of its taxable years. No additional assessments for any such taxable years are anticipated and all charges, accruals and reserves for federal taxes are deemed adequate.

9. No event has occurred and is continuing and no condition exists which constitutes or which after notice or lapse of time, or both, would constitute an event of default hereunder.

Upon the occurrence of any of the following events of

default; (a) default in the payment or performance of (i) any obligation of the undersigned to the holder hereof, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising (the "obligations"), or (ii) any obligation to the holder of any endorser or guarantor of any of the obligations; (b) loss, theft, substantial damage, sale or encumbrance to or of any property constituting collateral herefor or the making of any levy, seizure or attachment thereof or thereon or the failure to pay when due any tax thereon or, with respect to any insurance policy, any premium therefor; (c) default under any mortgage, deed of trust, security agreement, loan agreement or other document or instrument constituting collateral herefor; (d) dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, assignment for the benefit of creditors, by, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against the undersigned, or any endorser or guarantor hereof; (e) any representation, warranty, statement, certificate, schedule or report made herein or furnished in connection with the loan evidenced hereby shall prove to have been false or misleading in any material respect as of the time made or furnished; (f) default by the undersigned (as principal or guarantor or other surety) either in the payment of the principal of or premium, if any, or interest on any indebtedness for borrowed money (other than that evidenced hereby) or with respect to any of the provisions of any note, bond, debenture or similar obligation evidencing such indebtedness or of any agreement relating thereto and the continuance of such default beyond any period of grace provided with respect thereto; (g) acceleration of the maturity of any indebtedness of the undersigned for borrowed money; thereupon or at any time thereafter (such default not having been previously cured), at the

option of the holder, all obligations shall become immediately due and payable without notice or demand, provided, however, the undersigned shall have ten days from the receipt of written notice from Lender to cure any default other than the failure to pay principal or interest hereon as herein provided (or in the event such default cannot be cured within ten (10) days then within an additional reasonable period of time so long as the undersigned has commenced and is diligently pursuing curative action, provided, however, that such additional time shall not exceed fifty (50) days without the written agreement of FMI).

Any securities or other property of the undersigned, or any endorser or guarantor hereof in the possession of the holder may at all times be held as collateral for the payment and performance of the obligations and any and all obligations of any endorser or guarantor hereof to the holder, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising.

No delay or omission on the part of the holder in exercising any right hereunder shall operate as a waiver of such right or of any other right under this note. No waiver of any right shall be effective unless in writing and signed by the holder nor shall a waiver on one occasion be construed as a bar to or waiver of any such right on any future occasion.

While in default hereunder or under any of the terms of the Deed of Trust securing the same and after maturity, this note shall bear interest at the rate of one and one/half percent (1 1/2%) per month payable monthly on the first day of each month thereafter, in lieu of the rate hereinbefore specified. Should it become necessary to collect this note through any attorney, all parties hereto, whether maker, co-maker, endorser or guarantor, each severally agrees to pay all costs of collecting this note, including reasonable attorneys fees, whether collected by suit or otherwise.

As herein used the word "holder" shall mean the payee or any endorsee of this note who is in possession of it, or the bearer hereof, if this note is at the time payable to the bearer.

This note, and all rights and remedies with respect hereto, shall be determined as to their validity, construction, effect and enforcement, and in all other respects of the same or different nature, by the laws of Texas.

The maker may prepay all or any part of the principal amount of this note, provided that the maker shall give FMI thirty (30) days written notice of its intention and shall pay to FMI a prepayment penalty amounting to two percent (2%) of the face amount of this note. The maker may prepay all of the principal amount of this note with the proceeds of a permanent loan without penalty, provided that the Maker shall have given FMI thirty (30) days written notice of its intention. If FMI calls upon the permanent lender for funding under the terms of the permanent loan commitment there shall also be no prepayment penalty. By the term "permanent loan" is meant a loan to the Maker hereof for a term in excess of ten years, which loan is to be secured by the property covered by the Deed of Trust which secures this note, or the loan described by that certain Commitment of Navarro Savings Association given to the Maker hereof of even date herewith.

ROCKWALL ESTATES, INC.

By: /s/ William Lee Folse
William Lee Folse
Its: President

EXHIBIT B

Navarro Savings Association
West 3rd Avenue at North 12th Street
Corsicana, Texas 75110
Phone: 214 • 874-8251

July 26, 1971

Rockwall Estates, Inc.
Suite 2640, LTV Tower
Dallas, Texas, 75201

Attention:

Gentlemen:

1. *Commitment.* Subject to and upon the terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars (\$8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after February 1, 1974 and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars (\$850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate

being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1-1/2%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and improvements, fixtures and personal property situated thereon (the "Mortgaged Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

3. *Request for Loan.* Association shall have no obligation to make the Loan until the expiration of ninety (90) days after Borrower submits a written request therefor, which request must be received by Association not sooner than November 3, 1973 nor later than June 2, 1974.

4. *Conditions precedent to Loan.* Association shall have no obligation to make the Loan unless, on or before the Funding Date, Association receives each of the following, all of which must be in form and substance satisfactory in all respects to Association and its counsel:

- (a) The duly executed Note and Deed of Trust and such other loan closing documents as Association may request;
- (b) A mortgagee's title policy issued by a title company acceptable to Association, in the amount of the Loan

naming Association as the party insured, which policy must be dated the date of the closing of the Loan, guaranteeing that Association has a valid, first and prior lien on the Mortgaged Property, subject to no exceptions other than those approved by Association and its counsel;

- (c) A current survey of the Mortgaged Property, prepared by a registered, professional engineer approved by Association, which survey shall locate all improvements, easements, roads and rights-of-way, shall show no encroachments upon the property, and shall contain the surveyor's certification as to the number of acres contained in the Mortgaged Property;
- (d) Evidence satisfactory to Association that Borrower is duly incorporated, validly existing and in good standing under the laws of the State of Texas;
- (e) Opinion of counsel for Borrower that: (i) Borrower is a duly organized and validly existing business and in good standing in the State of Texas; (ii) The Note, Deed of Trust and other Loan papers evidence valid and binding obligations of Borrower, enforceable in accordance with their terms; (iii) Borrower has complied with all provisions of the Interstate Land Sales Full Disclosure Act, or that compliance therewith is unnecessary; and (iv) such other conclusions as Association may request;
- (f) Opinion of counsel for Association that: (i) the terms and conditions of this commitment have been complied with; and (ii) the Loan does not violate any applicable usury laws.
- (g) Evidence satisfactory to Association that the security interests created by the Deed of Trust are duly perfected and are subject to no prior or equal security interests;
- (h) Fire and extended coverage insurance policies, in the amount of the full insurable value of all insurable portions of the Mortgaged Property, with loss payable

to Association, issued by an insurer satisfactory to Association;

(i) Copies of resolutions of the board of directors of Borrower authorizing the execution and delivery of the Note, Deed of Trust and other Loan papers, and the performance of the terms thereof, accompanied by a certificate of the Secretary of Borrower, dated the date the Loan is made, that such copies are correct and complete;

(j) Certificate of incumbency for the officers of Borrower who execute the Note, Deed of Trust and other Loan papers;

(k) Evidence satisfactory to Association that: (i) Borrower has complied with all applicable laws, ordinances and regulations; (ii) the Loan is not subject to (or is otherwise exempt from) payment or withholding of the United States Interest Equalization Tax; (iii) Borrower is not insolvent; (iv) borrower has not committed an act of bankruptcy or made a general assignment for the benefit of all or most of its creditors; (v) no petition has been filed by or against Borrower under any provision of the National Bankruptcy Act, or under any insolvency, moratorium, debtor's relief or receivership laws; and (vi) the Mortgaged Property includes the clubhouse and pool, home/office facility and golf course described in the appraisal dated July 20, 1971, prepared by Real Estate Research Corporation;

(1) Such other evidence, opinions and documents as Association may request.

5. Usury. This commitment is being issued subject to the determination by Association and its legal counsel that the Loan, in its present form, does not violate applicable usury laws. It is not the intention of Association or Borrower to enter into a usurious transaction, and it is understood that if the agreements contained herein be usurious, any interest collected in excess of the legally permitted rate will be

refunded to Borrower, and the Note and Deed of Trust may at Borrower's option contain provisions to that effect.

6. Expenses. All expenses and fees in connection with the issuance of this commitment, or the making of the Loan shall be paid by Borrower, promptly after demand by Association, including, but not limited to, attorney's fees for Association's counsel, charges for title examination and insurance, charges for survey, and recording and filing fees.

7. Reduction of Loan Amount. It is contemplated that Borrower may, prior to the time the Loan contemplated hereby is funded, sell lots in the mobile-home subdivision which constitutes a part of the Mortgaged Property. The amount of the Loan shall be reduced by an amount equal to the number of lots which are unsold on the date hereof (such unsold lots being detailed on Exhibit "A" attached hereto) but which have been so sold by Borrower or which have been committed to be sold by Borrower prior to the funding date, times the applicable Loan Reduction Amount for each such lot, the Loan Reduction Amounts for each such lot being set forth on Exhibit "D" attached hereto and made a part hereof for all purposes. The Mortgaged Property shall not include the lots so sold or committed to be sold and for which the Loan amount has been reduced.

8. Pledge of Commitment. This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. Governing Law. No modification, consent, amendment, or waiver of any provisions of this commitment, or any related document, nor consent to any departure of Borrower therefrom, shall be effective unless the same shall be in writing and signed by an authorized representative of Association, and they shall be effective only in a specific

instance and for the purpose for which given. No notice to or demand on Borrower in any case shall, of itself, entitle Borrower to any other or further notice or demand in similar or other circumstances. No delay or omission by Association in exercising any power or right hereunder shall impair any such right or power or become construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such power preclude other or further exercise thereof, or the exercise of any other right or power hereunder. This commitment is binding upon and inures to the benefit of Borrower and Association, and their respective successors and assigns.

If the foregoing terms and conditions are acceptable to you, please indicate your acceptance thereof by signing in the space provided below on the enclosed counterpart of this letter. If the accepted counterpart hereof and the commitment fee have not been actually received by Association on or before 5:00 o'clock p.m., Central Daylight Time, on August 10, 1971, Association's offer herein to make the Loan shall terminate at such time.

Very truly yours,
**NAVARRO SAVINGS
ASSOCIATION**
By: /s/ Jas. W. McPherson

ACCEPTED:

ROCKWALL ESTATES, INC.

By: /s/ Wm. Lee Folse
July 27, 1971

(Exhibit A to Exhibit B of the pleading [a property description] deleted by agreement)

EXHIBIT C

July 26, 1971

Rockwall Estates, Inc.
Suite 2640, LTV Tower
Dallas, Texas, 75201

Attention:

Gentlemen:

1. *Commitment.* Subject to and upon the terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars (\$8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after September 8, 1973 and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars (\$850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1-1/2%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest

being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and improvements, fixtures and personal property situated thereon (the "Mortgaged Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

3. Request for Loan. Association shall have no obligation to make the Loan until the expiration of ninety (90) days after Borrower submits a written request therefor, which request must be received by Association not sooner than June 8, 1973 nor later than May 31, 1974.

4. Conditions precedent to Loan. Association shall have no obligation to make the Loan unless, on or before the Funding Date, Association receives each of the following, all of which must be in form and substance satisfactory in all respects to Association and its counsel:

(a) The duly executed Note and Deed of Trust and such other loan closing documents as Association may request;

(b) A mortgagee's title policy issued by a title company acceptable to Association, in the amount of the Loan naming Association as the party insured, which policy must be dated the date of the closing of the Loan, guaranteeing that Association has a valid, first and prior lien on the Mortgaged Property, subject to no exceptions other than those approved by Association and

its counsel;

- (c) A current survey of the Mortgaged Property, prepared by a registered, professional engineer approved by Association, which survey shall locate all improvements, easements, roads and rights-of-way, shall show no encroachments upon the property, and shall contain the surveyor's certification as to the number of acres contained in the Mortgaged Property;
- (d) Evidence satisfactory to Association that Borrower is duly incorporated, validly existing and in good standing under the laws of the State of Texas;
- (e) Opinion of counsel for Borrower that: (i) Borrower is a duly organized and validly existing corporation, with authority to transact business and in good standing in the State of Texas; (ii) the Note, Deed of Trust and other Loan papers evidence valid and binding obligations of Borrower, enforceable in accordance with their terms; (iii) Borrower has complied with all provisions of the Interstate Land Sales Full Disclosure Act, or that compliance therewith is unnecessary; and (iv) such other conclusions as Association may request;
- (f) Opinion of counsel for Association that: (i) the terms and conditions of this commitment have been complied with; and (ii) the Loan does not violate any applicable usury laws.
- (g) Evidence satisfactory to Association that the security interests created by the Deed of Trust are duly perfected and are subject to no prior or equal security interests;
- (h) Fire and extended coverage insurance policies, in the amount of the full insurable value of all insurable portions of the Mortgaged Property, with loss payable to Association, issued by an insurer satisfactory to Association;
- (i) Copies of resolutions of the board of directors of Borrower authorizing the execution and delivery of the Note, Deed of Trust and other Loan papers, and the

performance of the terms thereof, accompanied by a certificate of the Secretary of Borrower, dated the date the Loan is made, that such copies are correct and complete;

(j) Certificate of incumbency for the officers of Borrower who execute the Note, Deed of Trust and other Loan papers;

(k) Evidence satisfactory to Association that: (i) Borrower has complied with all applicable laws, ordinances and regulations; (ii) the Loan is not subject to (or is otherwise exempt from) payment or withholding of the United States Interest Equalization Tax; (iii) Borrower is not insolvent; (iv) borrower has not committed an act of bankruptcy or made a general assignment for the benefit of all or most of its creditors; (v) no petition has been filed by or against Borrower under any provision of the National Bankruptcy Act, or under any insolvency, moratorium, debtor's relief or receivership laws; and (vi) the Mortgaged Property includes the clubhouse and pool, home/office facility and golf course described in the appraisal dated July 20, 1971, prepared by Real Estate Research Corporation;

(l) Such other evidence, opinions and documents as Association may request.

5. Usury. This commitment is being issued subject to the determination by Association and its legal counsel that the Loan, in its present form, does not violate applicable usury laws. It is not the intention of Association or Borrower to enter into a usurious transaction, and it is understood and agreed that should it be determined by applicable law that the agreements contained herein be usurious, any interest collected in excess of the legally permitted rate will be refunded to Borrower, and the Note and Deed of Trust may at borrower's option contain provisions to that effect.

6. Expenses. All expenses and fees in connection with the issuance of this commitment, or the making of the Loan shall

be paid by Borrower, promptly after demand by Association, including, but not limited to, attorney's fees for Association's counsel, charges for title examination and insurance, charges for survey, and recording and filing fees.

7. Reduction of Loan Amount. It is contemplated that Borrower may, prior to the time the Loan contemplated hereby is funded, sell lots in the mobile-home subdivision which constitutes a part of the Mortgaged Property. The amount of the Loan shall be reduced by an amount equal to the number of lots which are unsold on the date hereof (such unsold lots being detailed on Exhibit "A" attached hereto) but which have been so sold by Borrower or which have been committed to be sold by Borrower prior to the funding date, times the applicable Loan Reduction Amount for each such lot, the Loan Reduction Amounts for each such lot being set forth on Exhibit "D" attached hereto and made a part hereof for all purposes. The Mortgaged Property shall not include the lots so sold or committed to be sold and for which the Loan amount has been reduced.

8. Pledge of Commitment. This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. In the event this Commitment is pledged as security for a loan to Borrower from Fidelity Mortgage Investors under the terms of the commitment letter from Fidelity Mortgage Investors dated August 6, 1971, the holder of such loan, upon thirty (30) days written notice, may require Association to make the loan committed hereby prior to September 8, 1973; provided, however, at the time of such notice and at the time of closing of the loan, Borrower must have been delinquent for more than sixty (60) days in the payment of installments due on the loan from Fidelity

Mortgage Investors and Borrower must have complied with all the terms and provisions of this Commitment.

10. Governing Law. This Commitment and the loan shall be governed by the substantive laws of the State of Texas.

11. Miscellaneous. No modification, consent, amendment, or waiver of any provisions of this commitment, or any related document, nor consent to any departure of Borrower therefrom, shall be effective unless the same shall be in writing and signed by an authorized representative of Association, and then shall be effective only in a specific instance and for the purpose for which given. No notice to or demand on Borrower in any case shall, of itself, entitle Borrower to any other or further notice or demand in similar or other circumstances. No delay or omission by Association in exercising any power or right hereunder shall impair any such right or power or become construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such power preclude other or further exercise thereof, or the exercise of any other right or power hereunder. This commitment is binding upon and inures to the benefit of Borrower and Association, and their respective successors and assigns.

If the foregoing terms and conditions are acceptable to you, please indicate your acceptance thereof by signing in the space provided below on the enclosed counterpart of this letter. If the accepted counterpart hereof and the commitment fee have not been actually received by Association on or before 5:00 o'clock p.m., Central Daylight Time, on September 10, 1971, Association's offer herein to make the Loan shall terminate at such time.

Very truly yours,

**NAVARRO SAVINGS
ASSOCIATION**
By: /s/ Jas. W. McPherson,
President

ACCEPTED: September 9, 1971

ROCKWALL ESTATES, INC.

By: /s/ Wm. Lee Folse, President

[Exhibits A, B, C, and D to Exhibit C of the Pleading are deleted from the Appendix by Agreement of the Parties].

EXHIBIT D

Navarro Savings Association
West 3rd Avenue at North 12th Street
Corsicana, Texas 75110
Phone: 214 • 874-8251

August 5, 1971

Mr. Ronald L. Langley
Vice President
Marketing
Performance Mortgage Advisors, Inc.
645 Riverside Avenue
Post Office Box 4214

Jacksonville, Florida 32201 REF: Rockwall Estates, Inc.
Mortgage Loan \$850,000.

Dear Ron:

In regards to the above captioned loan, it is our understanding that the committee has approved such a loan for a period of 24 months instead of 36 months as it was submitted to you.

Also, you have requested a provision whereby Navarro

Savings Association will either purchase such note or make available funds for additional loan at any time your note becomes delinquent. This is acceptable with us with the provision that you give us 60 days written notice prior to any such action.

The 1% loan discount which you have requested at time of closing is acceptable with the applicant.

If any additional information or questions arise concerning this loan, certainly feel free to give us a call.

Yours truly,

**NAVARRO SAVINGS
ASSOCIATION**

/s/ Jas. W. McPherson

James W. McPherson
President

JWM:sl

EXHIBIT E

ASSIGNMENT

STATE OF TEXAS

§

COUNTY OF DALLAS

§
§

ASSIGNMENT

WHEREAS, by note dated September 9, 1971, Fidelity Mortgage Investors, a Massachusetts business trust, has loaned to Rockwall Estates, Inc. \$850,000.00; and

WHEREAS, by Mortgage Loan Commitment of even date herewith, Navarro Savings Association has committed to loan Rockwall Estates, Inc. a sum not to exceed

\$850,000.00 from and after June 8, 1973 and up to and including May 31, 1974; and

WHEREAS, said Navarro Loan Commitment contains a provision whereby Fidelity Mortgage Investors may call the Navarro Commitment under certain specified conditions; and

WHEREAS, Fidelity Mortgage Investors desires that Rockwall Estates, Inc. pledge and assign the said Navarro Loan Commitment to Fidelity Mortgage Investors, as security for Fidelity Mortgage Investors' loan to Rockwall Estates, Inc.;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

THAT, for and in consideration of the loan from Fidelity Mortgage Investors to Rockwall Estates, Inc., dated September 9, 1971, Rockwall Estates, Inc. hereby assigns and pledges to Fidelity Mortgage Investors that certain Loan Commitment of even date herewith between Rockwall Estates, Inc. and Navarro Savings Association.

EXECUTED this the 10th day of September, 1971.

Rockwall Estates, Inc.
By: /s/ William Lee Folse
William Lee Folse
Its: President

AMENDED ANSWER OF NAVARRO SAVINGS ASSOCIATION

NAVARRO SAVINGS ASSOCIATION, Defendant files this, its Amended Answer to Plaintiffs' Amended Complaint, and for same shows:

1. *Motions To Dismiss on Jurisdictional Grounds:*
Pursuant to Rule 12(b)(1), Defendant moves to dismiss

this suit for want of subject matter jurisdiction, and in support thereof shows:

A. there is no diversity of citizenship between Plaintiffs and Defendant in that the residence of Fidelity Mortgage Investors is the same as that of its beneficial interest owners;

B. Defendant expressly objects to the exercise of subject matter jurisdiction and does not consent thereto, and therefore jurisdiction is not conferred by §23b of the Bankruptcy Act;

C. as this suit is not properly maintainable as a class action under Rules 23, 23.1 or 23.2, FRCP in that the claims of the beneficial interest owners of Fidelity Mortgage Investors are not in and to any specific assets, but are to the trust *res* as a whole, or if separable do not each exceed \$10,000 exclusive of costs and interest, jurisdiction founded upon diversity cannot be based solely on the residences of the trustees suing as class representatives;

D. the Amended Complaint wholly fails to plead a cause of action under the Securities Exchange Act of 1934, and thus jurisdiction cannot be founded upon the existence of a federal question.

2. Motions To Dismiss For Failure To State A Claim:

Defendant moves, pursuant to Rule 12(b)(6) to dismiss Counts I, II and III of the Amended Complaint for failure to state a claim upon which relief can be granted. In particular, Defendant shows:

A. In connection with all three counts,

(1) Plaintiffs fail to allege that they or Rockwall Estates, Inc., under whom they claim, complied with all conditions precedent to funding of the alleged loan commitment made the basis of this suit; or

(2) that Plaintiffs exercised due diligence to mitigate their damages, if any, incurred by reason of the refusal of Defendant to fund the alleged loan commitment made the basis of this suit; and

(3) in any event Plaintiffs acquired no rights under the alleged commitment letter made the basis of this suit;

B. Further, with respect to all three counts, same fail to state a claim upon which relief can be granted, either alone, in conjunction with one another, or in conjunction with the allegations invoking the Securities Exchange Act of 1934.

C. In connection with Count II, Plaintiffs were not, as a matter of law, third party beneficiaries of the alleged loan commitment made the basis of this suit.

3. Motions To Strike Portions of Pleadings:

Pursuant to Rule 12(f), Defendant moves to strike the following enumerated portions of the Amended Complaint:

A. All references to the recovery of attorneys fees because Plaintiffs are not entitled to recover same as a matter of law.

B. All references to punitive or exemplary damages because Plaintiffs are not entitled to recover same as a matter of law.

C. The first full paragraph (unnumbered) on page two of the Amended Complaint invoking the jurisdiction of this Court on the basis of a federal question arising under the Securities Exchange Act of 1934 because neither said paragraph standing alone, nor in conjunction with the remainder of the Amended Complaint states a cause of action for violation of said statute.

D. Paragraphs VIII, IX (insofar as it incorporates VIII by reference), XI, and "VIX" (sic) because same

set forth an incorrect measure of damages.

4. Answer To Allegations of Amended Complaint:

Without waiving the above and foregoing motions, but still insisting upon same, Defendant shows:

A. Defendant admits the allegations in the first paragraph on page one with respect to its incorporation and principal place of business. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the remainder of said paragraph, which has the effect of a denial thereof.

B. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the factual allegations of the second unnumbered paragraph, which has the effect of a denial thereof. The last sentence of said paragraph is denied.

C. The allegations of the third unnumbered paragraph are denied.

D. Defendant does not have sufficient knowledge or information to form a belief as to the truth of the matters set forth in Paragraphs I through V, inclusive, and as to the allegations of Paragraph VII with respect to Rockwall Estates, Inc. being delinquent in the payments on its loan, if any, from Fidelity Mortgage Investors, which has the effect of a denial thereof. Defendant admits that it received correspondence from an attorney for Plaintiffs concerning the funding of the alleged loan commitment made the basis of this suit.

E. The allegations of Paragraph VI and VIII are denied.

F. In response to Paragraph IX under Count II, Defendant incorporates by reference the preceding subparagraphs of this Paragraph 4.

G. The allegations of Paragraphs X and XI under

Count II are denied.

H. With reference to Paragraph XII under Count III, Defendant admits that McPherson was the President of Defendant and was authorized to use its stationery, but only pursuant to the business of Defendant. The remainder of said paragraph is denied.

I. The allegations of Paragraph "VIX" (sic) under Count III are denied.

5. Affirmative Defenses:

A. There was no consideration for the alleged commitment by Defendant made the basis of this suit to loan the sum of \$850,000 to Rockwall Estates, Inc. or Fidelity Mortgage Investors. The consideration provided in the alleged commitment letter made the basis of this suit was never received by Defendant, and the actions of Plaintiffs alleged to be in reliance on said commitment are not, as a matter of law, consideration for such commitment.

B. Under the applicable statutes and regulations the loan transaction contemplated by the alleged commitment letter made the basis of this suit could not have been consummated in that the sum of \$850,000 exceeded the amount which Defendant could have legally loaned to Rockwall Estates, Inc., or to any other one borrower. Further, McPherson, as President of Defendant, did not have authority to commit Defendant to a loan of such magnitude. Such facts were well known to Plaintiffs, their agents and attorneys, or by the exercise of reasonable diligence could have been ascertained. By reason of the legal inability of Defendant to make the loan, and the want of capacity on the part of McPherson to bind Defendant to make the loan, any obligation of Defendant under the alleged commitment letter made the basis of

this suit is void and unenforceable.

C. Neither Rockwall Estates, Inc. nor Fidelity Mortgage Investors complied with the conditions precedent to the obligation of Defendant under the alleged commitment letter made the basis of this suit, and therefore Defendant was under no duty to make the loan contemplated thereby.

D. The measure of damages claimed by Plaintiffs was not within the contemplation of the parties and was not the direct and proximate result of the breach of any duty or obligation owed by Defendant to Plaintiffs.

E. Plaintiffs failed to exercise reasonable efforts to mitigate their damages, if any.

F. Counts I, II and III, insofar as they purport to state claims under the Securities Exchange Act of 1934 are barred by the statutes of limitations applicable thereto. The cause of action, if any, asserted in Count III is in any event barred by the applicable statute of limitations.

G. At the time of the transactions made the basis of this suit, Plaintiffs, their agents, employees and attorneys failed to make due investigation into the capacity of Defendant to make a loan of \$850,000 to Rockwall Estates, Inc., failed to make due investigation into the authority of McPherson to bind Defendant to such an obligation, and failed to make due investigation of whether the consideration for the alleged loan commitment had been paid or whether the conditions precedent to the obligation of Defendant thereunder had been satisfied, all of which acts and omissions constituted negligence and singularly and collectively were a proximate cause of any losses sustained by Plaintiffs.

H. Insofar as the transaction made the basis of this suit may be deemed to involve a security, which is denied, such security and transaction were exempt from registration, and were not in interstate commerce.

WHEREFORE, Defendant prays:

1. That this suit be dismissed for want of subject matter jurisdiction; or
2. that this suit be dismissed for failure to state a claim upon which relief can be granted; or
3. Defendant's Motions to Strike be sustained; and
4. Plaintiffs take nothing by their suit and Defendant be discharged therefrom with its costs.

OPINIONS OF THE COURTS BELOW

The Opinion of the District Court in Cause No. CA-3-74-1231-C is reported at 416 F. Supp. 1186 (U.S.D.C., N.D. Tex., 1976) and is reproduced in full in the Petition for Writ of Certiorari beginning at Appendix Page 1a.

The Opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3350 is reported at 597 F.2d 421 (5th Cir., 1979) and is reproduced in full in the Petition for Writ of Certiorari beginning at Appendix Page 27a.

OTHER MATTERS

Stipulation of the Parties

The parties orally stipulated in the District Court and in the Court of Appeals that the Trust had at all material times beneficial shareholders who were residents of the State of Texas.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LAWRENCE F. LEE, JR., ET AL)
V.) CIVIL AC-
NAVARRO SAVINGS ASSOCIATION,) TION
) No. 3-74-
) 1231
)
)

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Arthur Milam, who being by me duly sworn, on oath stated the following:

My name is Arthur Milam and I am Secretary for Fidelity Mortgage Investors, and as such I have personal knowledge of the facts stated herein, and I am fully competent to testify to them.

The following persons are plaintiffs in the above-styled action and are current trustees of Fidelity Mortgage Investors: Robert M. Green, William B. Lane, Jr., Laurence F. Lee, Jr., James B. McIntosh, Jack H. Quaritius, Frederick H. Schroeder. All of the above-named trustees resided at the time of filing the above-styled action and at all times thereafter, and currently reside in and are citizens of states other than the State of Texas.

The following persons are plaintiffs and trustees and owners of shares in Fidelity Mortgage Investors: Laurence F. Lee, Jr., Jack H. Quaritius, Frederick H. Schroeder.

The documents attached hereto are true and correct

copies of the Declaration of Trust, the Amended and Restated Declaration of Trust, the Second Amended and Restated Declaration of Trust, the Third Amended and Restated Declaration of Trust, the Fourth Amended and Restated Declaration of Trust, and the Fifth Amended and Restated Declaration of Trust of Fidelity Mortgage Investors, as are on file in the Office of the Secretary of the Commonwealth of Massachusetts.

Also attached hereto is a true and correct copy of an Order Authorizing Debtor in Possession To Operate and Manage Business, issued by the United States District Court, Southern District of New York in the Chapter XI proceeding styled *In Re Fidelity Mortgage Investors, Debtors*, under Bankruptcy No. 75 B 154.

Prior to the amendments adopted at the shareholders meeting held on September 30, 1974, Fidelity Mortgage Investors operated in a manner intended to qualify under the terms of the Internal Revenue Code for treatment as a real estate investment trust, but subsequent to the adoption of those amendments Fidelity Mortgage Investors has not qualified as a real estate investment trust for purposes of special tax treatment under the Internal Revenue Code.

/s/ Arthur Milam
Arthur Milam

FIDELITY MORTGAGE INVESTORS
(A Massachusetts Business Trust)

FIFTH
Amended and Restated
Declaration of Trust

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to
FIDELITY MORTGAGE INVESTORS
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FIDELITY MORTGAGE INVESTORS AMENDED AND RESTATED DECLARATION OF TRUST

THIS DECLARATION OF TRUST, made the 29th day of May, 1969, in the County of Suffolk and Commonwealth of Massachusetts and recorded in the office of the Secretary of the Commonwealth of Massachusetts on May 29, 1969, is hereby amended pursuant to Section 8.3 thereof to read in its entirety as follows:

The Trustees hereby declare that all property, real personal or otherwise, tangible or intangible, and all other property of any description now held or hereafter acquired by or transferred to them in their capacities as trustees hereunder, together with the income and profit therefrom

and the proceeds thereof, shall be held by them in trust and shall be received, managed and disposed of for the benefit of the holders from time to time of the shares (the "Shareholders") being issued and to be issued hereunder and in the manner and subject to the terms and conditions herein provided. This instrument, together with all amendments hereto, is herein called this "Declaration". The term "Trustees" shall mean the trustees under this Declaration whether elected or appointed as hereinafter provided.

ARTICLE I

The Trust

1.1 Name. The trust created by this Declaration is herein referred to as the "Trust" and shall be known by the name "Fidelity Mortgage Investors". Except as otherwise provided herein, the Trustees shall conduct and transact the activities of the Trust, make and execute all documents and instruments and sue and be sued in the name of the Trust or in their names as Trustees of the Trust. If the Trustees determine that the use of the name "Fidelity Mortgage Investors" is not practical, legal or convenient, they may adopt such other name as they shall deem appropriate.

1.2 Location. The principal office of the Trust in Massachusetts shall be in Boston, Massachusetts, unless changed by the Trustees to another location in Massachusetts. The Trust shall have such other offices or places of business as the Trustees may from time to time determine.

1.3 Nature of Trust. The Trust shall be of the type commonly termed a Massachusetts business trust and shall not be a partnership, general or limited, joint venture, joint stock company, association or corporation. The Share-

holders shall be beneficiaries and their relationship to the Trustees shall be solely in that capacity in accordance with the rights conferred upon them hereunder. Neither the Trustees nor the Shareholders, nor any of them, shall for any purpose be deemed to be, partners or members of an association.

1.4 Purpose. The principal purpose or business of the Trust shall be to invest the assets of the Trust in notes, bond or other obligations secured by Mortgages on Real Property or rights or interests in Real Property. The Trust may engage in other business and commercial activities related to the Trust's principal business, including investment on a secured or unsecured basis in all types of property and securities, real, personal or mixed, tangible or intangible, as the Trustees may deem advisable and the Trustees' determination that such activities are related to the Trust's principal business shall be conclusive for all purposes. The Trustees may, but shall not be required to, cause the Trust to be operated in a manner to qualify the Trust as a "real estate investment trust" as defined in Section 856 of the Internal Revenue Code of 1954.

ARTICLE II

Trustees

2.1 Number, Term of Office, Qualification and Compensation of Trustees. There shall be not less than three (3) nor more than eleven (11) Trustees. The initial Trustees shall be the three (3) signatories to the Declaration as originally filed on May 29, 1969. The number of Trustees may be increased or decreased from time to time by the

Trustees in the manner stated in the Trustees' Regulations. The term of office of each Trustee shall be one (1) year and until the election and qualification of his successor. Trustees shall be elected at the annual meeting of Shareholders by a majority of the votes cast at such meeting. Trustees may succeed themselves in office. Trustees shall be individuals who are at least 21 years old and not under legal disability and at least a majority shall be citizens of the United States of America. No Person shall qualify as a Trustee until he shall have either signed this Declaration or agreed in writing to be bound by this Declaration. No Trustee shall be required to give bond, surety or security to secure the performance of his duties or obligations hereunder. The Trustees shall receive such fee for their services as they shall deem reasonable and proper and shall be entitled to receive additional remuneration for services rendered to the Trust in any other capacity, including, without limitation, legal, accounting, brokerage, underwriting or other professional services or as an officer or employee of the Trust.

2.2 Resignation, Removal and Death. A Trustee may resign at any time by giving written notice thereof in recordable form to the other Trustees at the principal office of the Trust. The acceptance of a resignation shall not be necessary to make it effective. A Trustee may be removed with or without cause by the vote of a majority of the outstanding Shares or with cause by the vote of a majority of the Trustees. Upon the resignation or removal of any Trustee, he shall execute and deliver such documents and render such accounting as the remaining Trustees shall require and shall thereupon be discharged as Trustee. Upon the incapacity or death of any Trustee, his legal representative shall perform the acts set forth in the preceding sentence.

2.3 Vacancies. The resignation, removal, incompetency

or death of any or all of the Trustees shall not terminate the Trust or affect its continuity. During a vacancy, the remaining Trustee or Trustees (even though less than three (3)) may exercise the powers of the Trustees hereunder. Vacancies among the Trustees (including vacancies resulting from an increase in the number of Trustees) may be filled by a written designation signed by a majority of the remaining Trustees. Appointments shall take effect upon the qualification of the appointee, and shall be for a term continuing until the next annual election of Trustees and until the election or appointment and qualification of a successor in accordance with this Declaration.

2.4 Successor Trustees. The right, title and interest of the Trustees in and to the Trust Estate shall vest automatically in all persons who may hereafter become Trustees upon their due election or appointment and qualification without any further act, and thereupon, they shall have the same rights, privileges, powers, duties and immunities as though originally named as Trustees in this Declaration. Appropriate written evidence of the election or appointment and qualification of successor Trustees shall be filed with the records of the Trust and in such other offices or places as the Trustees may deem necessary, appropriate or desirable. Upon the resignation, removal or death of a Trustee he (and in the event of his death, his estate) shall automatically cease to have any right, title or interest in or to any of the Trust Estate, and the right, title and interest of such Trustee in and to the Trust Estate shall vest automatically in the remaining Trustees without any further act.

A certificate or other written instrument signed by a majority of the Trustees stating who at any time are or were Trustees shall constitute *prima facie* proof of the matters set forth therein.

2.5 Actions by Trustees. The Trustees may act with or without a meeting. Except as otherwise provided herein, any action of a majority of Trustees present at a duly convened meeting of the Trustees shall be conclusive and binding as an action of the Trustees. A quorum for meetings of Trustees shall be a majority of all of the Trustees in office. Action may be taken without a meeting by the written consent of a majority of the Trustees. Any action or actions permitted to be taken by the Trustees may be taken pursuant to authorization granted at a meeting of the Trustees conducted by a telephone conference call. The minutes of any Trustees' meeting shall be prepared in the same manner as a meeting of the Trustees held in person. Any action taken by the Trustees in accordance with the provisions of this paragraph 2.5 shall be conclusive and binding upon the Trust, upon the Trustees and upon the Shareholders, as an action of all the Trustees, collectively, and of the Trust.

ARTICLE III

Trustees' Powers

3.1 General Power of Trustees. The Trustees shall have, without other or further authorization, full, absolute and exclusive power, control and authority over the Trust Estate and of the business and affairs of the Trust, free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right, subject only to the limitations contained in this Declaration. The Trustees may do and perform such acts and things as in their sole judgment and discretion are necessary and proper for carrying out the

purposes of the Trust or conducting its business and affairs. The enumeration of specific powers shall not be construed as limiting the exercise of general powers or any other specific power. Such powers of the Trustees may be exercised without order of or resort to any court.

3.2 Specific Powers. Without restricting or limiting the general powers granted in the preceding paragraph, the powers of the Trustees shall include, among others, the following (subject always to the limitations and restrictions stated elsewhere in this Declaration):

(a) To retain, invest and reinvest the capital and funds of the Trust in any property, real, personal or otherwise, tangible or intangible, whether or not such property is authorized by law for investment by trust funds.

(b) To invest in, purchase or acquire for cash, other property or, through the issuance of its Shares, notes, debentures, bonds or other obligations, any notes, bonds or other obligations which are secured by Mortgage Loans (or any interest therein) and, in connection therewith, receive a participation in any rents, lease payments, gross income, profits, equity or ownership of Real Property securing such Mortgages; to invest in loans secured by the pledge or transfer of Mortgage Loans; and to develop, operate, pool, unitize, grant production payments out of, lease or otherwise dispose of mineral, oil and gas properties and rights.

(c) To purchase, acquire, own, hold, manage, improve, lease (for a term extending beyond the possible termination of the Trust or for a lesser term), option, grant, sell, exchange, dispose of, encumber, mortgage (with or without power of sale), partition, surrender, release or otherwise deal in and with Real Property and assets, real or personal; and to erect, construct, alter, repair, demolish or

otherwise physically affect any buildings, structures or improvements situated on or comprising any real property interests owned or to be owned by the Trust.

(d) To sell, rent, exchange, assign, mortgage, pledge, grant security interests in, convey, transfer or otherwise dispose of any and all of the Trust Estate by deeds, trust deeds, assignments, bills of sale, leases, mortgages, financing statements, security agreements and other instruments, whether the term thereof extends beyond the term of office of the Trustees and beyond the possible termination of the Trust or for a lesser term.

(e) To issue shares, bonds, debentures, notes or other evidences of indebtedness, which may be secured, unsecured, subordinated to other indebtedness of the Trust or convertible into Shares and which may include options, warrants and rights to subscribe to, purchase or acquire Shares to such Persons for such cash, property or other consideration (including Securities of any other Person) on such terms as the Trustees may deem advisable and list any of the foregoing Securities issued by the Trust on any securities exchange and to purchase or otherwise acquire, hold, cancel, reissue, sell and transfer any of such Securities.

(f) To borrow money and give negotiable or non-negotiable instruments therefor; to guarantee, indemnify or act as surety with respect to payment or performance of obligations of third parties; and to assign, convey, transfer, mortgage, subordinate, pledge, grant security interests in, encumber or hypothecate the Trust Estate to secure any of the foregoing.

(g) To lend money, whether secured or unsecured.

(h) To create reserve funds for any purpose.

(i) To incur and pay out of the Trust Estate any charges

or expenses and disburse any funds of the Trust, which charges, expenses or disbursements are, in the opinion of the Trustees, necessary or proper for carrying out the purposes of the Trust or conducting its business and affairs.

(j) To deposit funds of the Trust in banks, trust companies, savings and loan associations and other depositories, whether or not such deposits will draw interest.

(k) To possess and exercise all the rights, powers and privileges incident to the ownership of Mortgage Loans or Securities issued or created by, or interests in, any Person forming part of the Trust Estate to the same extent that an individual might.

(l) To organize or assist in organizing any Person under the laws of any jurisdiction to acquire all or any part of the Trust Estate or to carry on any business in which the Trust shall directly or indirectly have any interest, and to sell, lease, convey, assign, exchange or transfer the Trust Estate, or any part thereof, to any such Person in exchange for the Securities thereof and to lend money to, subscribe for the Securities of or enter into any contracts with any such Person.

(m) To enter into joint ventures, general or limited partnerships and any other lawful combinations or associations.

(n) To create or appoint an Executive Committee from among their number consisting of three (3) members and which shall have such powers, duties and obligations as the Trustees shall deem necessary and proper, including, without limitation, the power to conduct the business and affairs of the Trust during the interim between meetings of the Trustees; provided, however, that such Executive

Committee shall not have the authority to amend this Declaration or alter or modify the Trust's investment objectives.

(o) To elect officers for the Trust (including a Chairman of the Board, President, Secretary, Treasurer and such Vice Presidents as the Trustees may determine) who may be removed or discharged at the discretion of the Trustees, such officers to have such powers and duties and to serve such terms as the Trustees shall determine; to engage or employ any Persons (including any Trustee or officer and any Person who is directly or indirectly controlled by any Trustee or officer) as agents, representatives, employees or independent contractors (including, without limitation, real estate advisors, investment advisors, transfer agents, registrars, underwriters, accountants, attorneys, real estate agents, managers, appraisers, brokers, architects, engineers, construction managers, general contractors or otherwise) in one or more capacities, and to pay compensation from the Trust for services in as many capacities as such Person may be so engaged or employed; and, except as prohibited or limited by law, to delegate any of the powers and duties of the Trustees to any one or more Trustees, the Executive Committee, agents, representatives, officers, employees, independent contractors or other Persons.

(p) To allocate all receipts, moneys or property between income and capital; to amortize any premium or discount; to apportion any profit resulting from the maturity or sale of any asset or the sales price thereof, between income or capital; to determine in what manner expenses or disbursements are to be borne as between income and capital; to apportion any dividend or other distribution on any investment as income or capital and to

provide reserves for depreciation, amortization or obsolescence in respect of the Trust Estate.

(q) To determine from time to time the value of the Trust Estate and of any services, Securities, property or other consideration to be furnished to or acquired by the Trust, and from time to time to revalue the Trust Estate in accordance with such appraisals as the Trustees shall determine.

(r) To collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon or adjust, any actions, suits, claims, demands or other litigation relating to the Trust, the Trust Estate or the Trust's affairs.

(s) To renew, modify, release, compromise, extend, consolidate or cancel, in whole or in part, any obligation to or of the Trust.

(t) To procure insurance policies insuring the Trust Estate against any and all risks and insuring the Trust and/or any or all of the Trustees, the Shareholders or officers against any and all claims and liabilities of any sort arising out of any act or failure to act of the Trust, the Trustees, the Shareholders or the officers.

(u) To cause legal title to the Trust Estate to be held in the name of the Trustees or, except as prohibited by law, in the name of the Trust or one or more of the Trustees or any Person or nominee designated by the Trustees, on such terms, in such manner, with such powers as the Trustees shall determine and with or without disclosure that the Trust or the Trustees are interested therein.

(v) To determine the fiscal year of the Trust and the method or form in which its accounts shall be kept and, from time to time, to change the fiscal year or method or form of accounts.

(w) To adopt and use a seal (but the use of a seal shall not be required for the execution of instruments or obligations of the Trust).

(x) To pay all taxes and assessments, of whatever kind or nature, imposed upon or against the Trust Estate, or any part thereof, or upon or against any Trustee, in connection with the activities, affairs or business of the Trust, and in that connection to make such returns, claims for refund, or agreements, and to do such other acts or things, as may be deemed necessary, appropriate or desirable by the Trustees.

(y) To adopt and amend Trustees' Regulations which may include, subject to the terms of this Declaration, provisions relating to meetings of the Trustees and of the Shareholders; matters relating to voting and the use of proxies; the election or appointment of officers, employees, representatives and agents; the form of Shares and the conditions for replacing lost, mutilated or stolen certificates; and the procedures for amendment of Trustees' Regulations.

(z) To exercise with respect to property of the Trust, all options, privileges and rights, whether to vote, assent, subscribe or convert the same; to grant proxies and to participate in and accept Securities issued under any voting trust agreement.

(aa) To purchase, acquire through the issuance, sale or exchange of shares, merge or consolidate with, or invest in other real estate investment trusts or Persons.

3.3 Additional Powers. The Trustees shall have power to do all such things and execute all such instruments as they deem necessary, proper or desirable in order to carry out, promote or advance the purposes of this Trust although such matters or things are not herein specifically mentioned. Any

determination of the purposes of the Trust made by the Trustees in good faith shall be conclusive. In construing the provisions of this Declaration, the presumption shall be in favor of the grant of power to the Trustees.

ARTICLE IV

Manager; Limitation on Operating Expenses

4.1 Employment of Manager. The Trustees are responsible for the general policies of the Trust and for such general supervision of the business of the Trust conducted by officers, agents, employees, investment advisers or independent contractors of the Trust as may be necessary to insure that such business conforms to the provisions of this Declaration. However, the Trustees are not required personally to conduct the business of the Trust and, consistent with their ultimate responsibility as stated herein, the Trustees shall have power to appoint, employ or contract with any such natural or legal Person or Persons (including one or more of themselves and any corporation, partnership or trust in which one or more of them may be directors, officers, stockholders, partners or trustees) as the Trustees may deem necessary or desirable for the transaction of the business of the Trust. The Trustees may, therefore, employ or contract with a corporation, partnership, trust or individual (herein referred to as the "Manager"), and the Trustees may grant or delegate such authority to the Manager as the Trustees may, in their sole discretion, deem necessary or desirable, without regard to whether such authority is normally granted or delegated by trustees.

The Trustees shall have the power to determine the terms of compensation of the Manager or any other such Person or

Persons whom they may employ or with whom they may contract; provided, however, that any determination to appoint, employ, or contract with any Trustee or any entity with which a Trustee is affiliated by reason of a managerial or ownership interest, shall be valid only if made, approved or ratified, after disclosure of such relationship, by a majority of the Trustees not so affiliated. The Trustees may exercise broad discretion in allowing the Manager to administer and regulate the operations of the Trust, to act as agent for the Trust, to execute documents on behalf of the Trustees, and to make executive decisions which conform to general policies and general principles previously established by the Trustees.

4.2 Term. The Trustees shall not enter into any contract with the Manager unless such contract has an initial term of no more than one (1) year and provides for annual renewal or extension thereafter, except that the first contract with the Manager entered into by the Trustees may have an initial term not exceeding two (2) years. Any such contract with the Manager shall be terminable with or without cause upon 60 days notice to the Manager by the Trustees. The Trustees shall not enter into such a contract with any Person in which a Trustee is a director, officer, employee, stockholder or partner unless such contract provides for renewal or extension thereof by the affirmative vote of a majority of the other Trustees. Each renewal or extension of any such contract must be executed not less than six (6) months nor more than eight (8) months prior to the expiration of the then current term.

4.3 Relationship of Trustees to Manager. Not more than forty-nine percent (49%) of the total number of Trustees may be directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any

person who is affiliated with the Manager; provided, however, that if at any time the percentage of Trustees who are directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any person who is affiliated with the Manager becomes, by reason of vacancies, more than forty-nine percent (49%) of the total number of Trustees then in office, then, within sixty (60) days of such occurrence, the continuing Trustees or Trustee shall appoint a sufficient number of Trustees so that there is again not more than forty-nine percent (49%) of the total number of Trustees then in office who are directors, officers, employees, or holders of more than 1/2 of 1% of the stock of the Manager or any person who is affiliated with the Manager.

4.4 Restrictions on Manager. The Manager may administer the Trust as its sole and exclusive function or engage in other activities, including the rendering of advice to other investors and the management of other investments. The Trustees may request the Manager to engage in certain other activities which complement the Trust's investments.

The Manager shall not, without the prior written consent of a majority of the Trustees, invest in nor render advice or service to any Person other than the Trust in connection with any investment in Development Loans, Construction Loans or other Mortgage Loans or interests in Real Property of a type which the Trustees may have subsequently declared to be a principal investment objective of the Trust, except that the Manager may, with respect to any loan or other investment in which the Trust may participate or allot a participation, render advice and service, with or without remuneration, to each and every participant in such loan or other investment.

4.5 Limitation on Operating Expenses. The Operating

Expenses of the Trust, including any fees or expenses payable to the Manager, shall not exceed an amount equal to one and one-half percent (1 1/2%) of the Net Assets of the Trust, and each contract made with the Manager shall provide for a refund to the Trust of the amount, if any, by which the Operating Expenses exceed said amount.

ARTICLE V

Investment Policy

5.1 Permitted Investments. The Trustees shall invest the Trust Estate in Real Property and the ownership of any interests in Real Property, Securities of Persons involved in owning, operating, leasing, developing, financing or dealing in Real Property, publicly-held Securities and Mortgage Loans of all kinds, including, without limitation, intermediate and long-term Mortgages, Construction Loans, Development Loans, Loans on unimproved Real Property, First Mortgage Loans, Junior Mortgage Loans, Wrap-Around Loans, Standby Commitments, Gap Commitments, sale and leasebacks, land purchase leasebacks, net lease financings, purchase and installment salebacks, high credit lease-secured Mortgages, convertible Mortgages, Mortgages of special interests in Real Property, including, without limitation, leaseholds, air rights and condominiums, and any other Real Property financing techniques which might be developed in the future. The Trustees are authorized to make commitments to make investments consistent with the foregoing policies.

Subject to the investment restrictions contained in paragraph 5.3, the Trustees may determine and establish what

proportion of the Trust Estate may be invested in any investments permitted by this Article, may establish standards and guidelines to be followed in making all such investments, and may amend or alter any or all investment policies, standards and guidelines of the Trust if, in their judgment, such change would be in the best interests of the Trust. The failure of the Trustees to invest the Trust Estate in accordance with this Article shall not affect the validity of any investment made or action taken by the Trustees.

The Trustees may, but shall not be required to, make investments in such a manner as to comply with the requirements of the REIT Provisions with respect to the composition of the Trust's investments and the derivation of its income; provided, however, that no Trustee, officer, employee or agent of the Trust shall be liable for any act or omission resulting in the loss of tax benefits under the Internal Revenue Code except for that arising from his own bad faith, willful misconduct, gross negligence or reckless disregard of his duties or for his failure to act in good faith in the reasonable belief that his action was in the best interests of the Trust.

5.2 Uninvested Assets. To the extent that the Trust has assets not otherwise invested in accordance with paragraph 5.1, the Trustees may invest such assets in:

(a) obligations of, or obligations guaranteed by, the United States Government or any agencies or political subdivisions thereof;

(b) obligations of, or obligations guaranteed by, any state, territory or possession of the United States of America, or any agencies or political subdivisions thereof;

(c) evidences of deposits in, or obligations of, banking institutions, state and federal savings and loan associ-

ations and savings institutions which are members of the Federal Deposit Insurance Corporation or of the Federal Home Loan Bank System; and,

(d) shares of other real estate investment trusts, to the extent permitted by the REIT Provisions, which do not, to the actual knowledge of the Trustees, hold investments or engage in activities prohibited to the Trustees under paragraph 5.3.

(e) subject to the restrictions of paragraph 5.3, any other type of property, real, personal or mixed, tangible or intangible.

5.3 Restrictions. The Trustees shall not:

(a) invest more than 10% of the Total Assets of the Trust in unimproved Real Property or Mortgage Loans secured by Mortgages on unimproved Real Property; provided, however, that there shall be excluded from any computation made with respect to this paragraph 5.3(a) unimproved Real Property which is then in the process of development or which will be developed within a reasonable period following the date as of which such computation is made;

(b) invest more than 10% of the Total Assets of the Trust in obligations secured by Junior Mortgages, excluding Wrap-Around Loans and any Mortgage Loan to the extent made or acquired against a commitment from a recognized institutional lender for an intermediate or long-term Mortgage Loan;

(c) issue equity securities of more than one class (other than convertible obligations, warrants, rights and options) or issue 'redeemable securities' as defined in Section 2(a) (31) of the Investment Company Act of 1940;

(d) invest in real estate contracts for sale (except under

circumstances wherein the investment of the Trust is substantially equivalent to a mortgagee's interest) in excess of a value of 1% of the Total Assets of the Trust; provided, however, that nothing in this paragraph 5.3(d) shall prevent the holding of such contracts of sale as security for loans made by the Trust and the ownership of such contracts of sale upon foreclosure of, or realization upon, such security interest, and contracts of sale so held or owned shall be excluded from the computation required by this paragraph 5.3(d);

(e) engage in the business of underwriting or agency distribution of securities issued by others, but this prohibition shall not prevent the Trust from selling participations in Mortgage Loans or interests in Real Property; and

(f) invest in commodities or engage in any short sale.

5.4 Obligor's Default. Notwithstanding any provision in any Article of this Declaration of Trust, when an obligor to the Trust is in default under the terms of any obligation to the Trust (or, in the good faith judgment of the Trustees, there is a substantial risk that such a default may occur), the Trustees shall have the power to take any action and to pursue any remedies permitted by law which, in their sole judgment, are in the interest of the Trust, and the Trustees shall have the power to hold property of a type and in an amount not permitted hereunder and to enter into any desirable investment, commitment or obligation of the Trust resulting from the pursuit of such action or remedies or necessary or desirable to dispose of property acquired in the pursuit of such action or remedies.

ARTICLE VI

The Shares and Shareholders

6.1 Shares. The interest of the beneficiaries in the Trust shall be divided into Shares, all of one (1) class and with a par value of One Dollar (\$1.00) per share. The Shares shall be personal property. The certificates evidencing the Shares shall be in such form and signed (manually or by facsimile) on behalf of the Trust in such manner as the Trustees shall determine. The certificates shall be negotiable and title thereto shall be transferred by assignment and delivery in all respects as a stock certificate of a Massachusetts corporation. There shall be no limit upon the number of Shares to be issued. The Shares may be issued for such consideration as the Trustees shall determine. The Trustees may authorize share dividends or share splits. All Shares shall be of the same class and shall have equal dividend, distribution, liquidation and other rights.

Each Shareholder shall be entitled to cast one vote for each Share held for the election of Trustees and on all other matters submitted to the vote of the Shareholders except that Shares reacquired by the Trust shall no longer be deemed outstanding and shall have no voting or other rights unless and until reissued. Shares reacquired by the Trust may be cancelled and restored to the status of authorized and unissued Shares by action of the Trustees. All Shares shall be fully paid and nonassessable by or on behalf of the Trust upon receipt of full consideration for which they have been issued or without additional consideration if issued by way of share dividends or share splits. Shares shall not have cumulative voting rights. No fractional Shares shall be issued.

6.2 Rights of Shareholders. The Shares shall not entitle the holder to preference, preemptive, appraisal, conversion or exchange rights of any kind. The Shareholders shall have no legal right, title or interest in or to the Trust Estate and shall have no right to a partition thereof during the continuance of the Trust. Shareholders shall, however, be the equitable beneficiaries of the Trust, but shall have only the rights provided for in this Declaration and in the Trustees' Regulations. Except with respect to matters in which the Shareholders are specifically given the right to vote by this Declaration, no action taken by the Shareholders at any meeting shall in any way bind the Trustees.

6.3 Shares Deemed Personal Property. The Shares shall be personal property. The death, insolvency or incapacity of a Shareholder during the continuance of the Trust shall not terminate the Trust or give the legal representative of such Shareholder any right to any partition or accounting with respect to the Trust Estate or any income or profits therefrom, or to take any action in the courts or otherwise against other Shareholders or the Trustees or the Trust Estate, but shall simply entitle such legal representative to demand and, subject to any requirements of law, to receive a new certificate representing Shares in place of the certificate held by said Shareholder, upon the receipt of which such legal representative shall succeed to all the rights of the said Shareholder under this Declaration.

6.4 Records, Issuance and Transferability of Shares. Stock records shall be kept by the Trustees, containing the names and addresses of the Shareholders, the number of Shares held by each and the certificate numbers. The issuance and transfer of all Shares shall be recorded in such stock records. The Persons in whose names certificates are registered on such records shall be deemed the absolute

owners of the Shares for all purposes of the Trust; but nothing herein shall preclude the Trustees from inquiring as to the actual ownership of Shares. Until a transfer is duly entered on the records of the Trust, the Trustees shall not be affected by any notice of such transfer, either actual or constructive. The receipt by the Person in whose name any Shares are registered on the records of the Trust or of the duly authorized agent of such Person, or if such Shares are so registered in the names of more than one Person, the receipt of any one of such Persons, or of the duly authorized agent of such Person, shall be a sufficient discharge for all dividends or distributions payable or deliverable in respect of such Shares and from all liability to see to the application thereof.

Shares shall be transferable on the records of the Trust only by the record holder thereof or by his agent thereunto duly authorized in writing upon delivery to the Trustees or a transfer agent of the certificate or certificates therefor, properly endorsed or accompanied by duly executed instruments of transfer and accompanied by all necessary documentary stamps, together with such evidence of the genuineness of each such endorsement, execution or authorization and of other matters as may reasonably be required by the Trustees or such transfer agent. Upon such delivery, the transfer shall be recorded in the records of the Trust and a new certificate for the Shares so transferred shall be issued to the transferee. Any Person entitled to any Shares because of the death of a Shareholder or by operation of law shall receive a new certificate therefor upon delivery to the Trustees or a transfer agent of satisfactory proof of the right of such Person to the receipt of such Shares, the existing certificate for such Shares and all necessary releases from applicable governmental authorities. In case of the loss, mutilation or destruction of any certificate for Shares, the

Trustees may issue or cause to be issued a replacement certificate on such terms and conditions as the Trustees shall determine.

6.5 Dividends or Distributions to Shareholders. The Trustees may from time to time declare and pay to Shareholders, in proportion to their respective ownership of Shares, such dividends or distributions in cash or other property, out of current or accumulated income, capital, capital gains, principal, surplus, or from any other source as the Trustees in their discretion shall determine. Shareholders shall have no right to any dividend or distribution unless and until declared by the Trustees and the determination of the earnings, surplus and profits available therefor shall lie wholly in the discretion of the Trustees. The Trustees shall furnish the Shareholders at the time of each such distribution a statement in writing advising as to the source of the funds so distributed or, if the source thereof has not then been determined, the communication shall so state and in such event, the statement as to such source shall be sent to the Shareholders not later than sixty (60) days after the close of the fiscal year in which the distribution was made.

6.6 Transfer Agent, Dividend Disbursing Agent and Registrar. The Trustees shall have power to employ one or more transfer agents, dividend-disbursing agents and registrars and to authorize them on behalf of the Trust to do and perform such duties and acts as are performed by transfer agents, dividend-disbursing agents and registrars for corporations.

6.7 Shareholders' Meetings. There shall be an annual meeting of the Shareholders at such time and place as the Trustees shall prescribe at which all Trustees shall be elected or re-elected and any other proper business may be

conducted. The annual meeting of Shareholders shall be held after delivery to the Shareholders of the annual report and within six (6) months after the end of each full fiscal year. Special meetings of Shareholders may be called by a majority of the Trustees and shall be called upon the written request of Shareholders holding not less than twenty percent (20%) of the outstanding Shares of the Trust entitled to vote in the manner provided in the Trustees' Regulations. If there shall be no Trustees, the officers of the Trust shall promptly call a special meeting of the Shareholders for the election of successor Trustees. Notice of all meetings shall be given as provided in the Trustees' Regulations and the notice of any special meeting shall state the purposes of the meeting. A majority of the outstanding Shares entitled to vote at any meeting represented in person or by proxy shall constitute a quorum at any such meeting. Whenever any action is to be taken by the Shareholders, it shall, except as otherwise required by this Declaration or by law, be authorized by a majority of the votes cast at a meeting of Shareholders by holders of Shares entitled to vote thereon. The affirmative vote of the holders of a majority of all outstanding Shares shall be required to approve any sale, lease, exchange or other disposition of more than fifty percent (50%) of the Trust Estate, but no such vote or consent shall be required for the sale, lease, exchange or other disposition of less than fifty percent (50%) of the Trust Estate. Any Shareholder action may be taken without a meeting on written consent signed by the holders of a majority of all outstanding Shares entitled to vote thereon, or such larger proportion otherwise required hereunder.

6.8 Proxies. Whenever the vote or consent of Shareholders is required or permitted under this Declaration, such vote or consent may be given either directly by the Share-

holder or to a proxy in the form prescribed by the Trustees. The Trustees may solicit such proxies from the Shareholders or any of them in any matter requiring or permitting the Shareholders' vote or consent.

6.9 Reports to Shareholders.

(a) Not later than one hundred twenty (120) days after the close of each fiscal year of the Trust, the Trustees shall mail to the Shareholders an annual report of the business and operations of the Trust during such fiscal year containing a balance sheet and a statement of income and surplus of the Trust. All financial statements shall be certified by a firm of independent certified public accountants or independent public accountants of nationally recognized standing, based on an examination of the books of the Trust not materially limited in scope, and made in accordance with generally accepted accounting procedures.

(b) Not later than sixty (60) days after the close of each of the first three (3) quarters of each fiscal year of the Trust, the Trustees shall submit a balance sheet and a statement of income and surplus and other pertinent information regarding the Trust and its activities during such quarter to the Shareholders, which financial statements shall be certified by the Trustees but need not be audited or certified by independent certified public accountants or independent public accountants.

(c) All reports shall be in such form and contain such items as the Trustees shall determine and shall constitute periodic accountings by the Trustees to the Shareholders.

6.10 Fixing Record Date. The Trustees may fix, in advance, a date as the record date for determining the Shareholders entitled to notice of or to vote at any meeting of Shareholders or to consent to any proposal without a

meeting or for the purpose of determining Shareholders entitled to receive payment of any dividend or distribution (whether before or after termination of the Trust). The record date so fixed shall be not less than ten (10) days nor more than sixty (60) days prior to the date of the meeting or event for the purposes of which it is fixed.

6.11 Sufficiency of Notice. Any notice or other communication to any shareholder shall be deemed duly delivered when deposited, postage prepaid, in the United States mail, addressed to such Shareholder at his address as it appears on the records of the Trust.

6.12 Shareholders' Disclosures; Redemption of Shares. In the event the Trust is operated in a manner to comply with the REIT Provisions, the Shareholders shall, upon demand, disclose to the Trustees in writing such information with respect to direct and indirect ownership of Shares as the Trustees deem necessary to comply with the REIT Provisions, or to comply with the requirements of any other governmental authority. If the Trustees shall, at any time and in good faith, be of the opinion that direct or indirect ownership of Shares of the Trust has or may become concentrated to an extent which is contrary to the requirements of Section 856(a)(5) or (6) of the Internal Revenue Code of 1954, then the Trustees shall have the power (i) to call for redemption a number of such concentrated Shares sufficient, in the opinion of the Trustees, to maintain or bring the direct or indirect ownership of Shares of the Trust into conformity with the requirements of said Section 856(a)(5) or (6) and (ii) to refuse to transfer Shares to any Person whose acquisition of the Shares in question would, in the opinion of the Trustees, result in a violation of said Section 856(a)(5) or (6). The redemption price shall be equal to the fair market value of the Shares as reflected in the

average bid quotation for the Shares (if then traded over-the-counter) or the average closing sale price (if then listed on a national securities exchange) during the 30 business days preceding the day on which notice of redemption is sent, or, if no quotations or closing sale price for the Shares are available, as determined in good faith by the Trustees. From and after the date fixed for redemption by the Trustees, the holder of any Shares so called for redemption shall cease to be entitled to dividends, voting rights and other benefits with respect to such Shares excepting only the right to payment of the redemption price fixed as aforesaid. For the purpose of this paragraph 6.12, the term "individual" shall be construed as provided in Section 542(a)(2) of the Internal Revenue Code of 1954, or any successor provision, and "ownership" of Shares shall be determined as provided in Section 544 of the Internal Revenue Code of 1954.

ARTICLE VII

Liability and Limitation Thereof

7.1 Exculpation. No Trustee or officer of the Trust shall be liable to the Trust, to any Trustee or to any Shareholder for any act or omission of any other Trustee, Shareholder, officer or agent of the Trust or be held to any personal liability whatsoever in tort, contract or otherwise in connection with the affairs of the Trust, except only that arising from his own wilful misfeasance, bad faith, gross negligence or reckless disregard of duty.

7.2 Limitation of Liability. Except as provided in paragraph 7.1, no Trustee, officer or Shareholder shall be subject to personal liability for any debt, claim, demand,

judgment, decree, liability or obligation of any kind of, against or with respect to the Trust, arising out of any action taken or omitted for or on behalf of the Trust and the Trust shall be solely liable therefor and resort shall be had solely to the Trust Estate for the payment or performance thereof. The Trustees and officers, in incurring any debt, liability, or obligation, or in taking or omitting any other action, for or in connection with the Trust are and shall be deemed to be acting as Trustees or officers and not in their individual capacities. The Trustees shall use every reasonable means to assure that all persons having dealings with the Trust shall be informed that the private property of the Shareholders and the Trustees shall not be subject to claims against and obligations of the Trust to any extent whatever. The Trustees shall cause to be inserted in every written agreement, undertaking or obligation made or issued on behalf of the Trust (including the Shares), an appropriate provision to the effect that the Shareholders and the Trustees shall not be personally liable thereunder, and that all parties concerned shall look solely to the Trust Property for the satisfaction of any claim thereunder, and appropriate reference shall be made to this Declaration. The omission of such a provision from any such agreement, undertaking or obligation, or the failure to use any other means of giving such notice, shall not, however, render the Shareholders or the Trustees personally liable. Each Shareholder shall be entitled to indemnity from the Trust Estate if, contrary to the provisions hereof, such Shareholder shall be held to any personal liability. The Trustees shall, at all times, maintain insurance against possible liability on the part of the Trust, *ex delicto*, in such amounts and against such other risks as the Trustees shall deem adequate to protect the Trust Estate, Shareholders, Trustees, officers and agents.

7.3 Indemnification and Reimbursement of Trustees and Officers. Any Trustee, officer or Shareholder shall be indemnified and held harmless by the Trust against judgments, fines, amounts paid on account thereof (whether in settlement or otherwise) and reasonable expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense of any action, suit, proceeding, claim or alleged liability asserted by reason of the fact that he or his testator was or is a Trustee, officer or Shareholder or in connection with any appeal therein, whether or not the same proceeds to judgment or is settled or otherwise brought to a conclusion; provided, however, that no such Person shall be indemnified or reimbursed if such claim, obligation or liability arose out of the Trustee's, officer's or Shareholder's wilful misfeasance, bad faith, gross negligence or reckless disregard of duty; and provided further, that such Person gives prompt notice thereof and takes such action as will permit the the Trust to conduct the defense thereof. Such rights of indemnification and reimbursement shall be satisfied only out of the Trust Estate.

7.4 Transactions Between Trustees and Trust

(a) Any Trustee or officer may acquire, own, hold and dispose of Shares in the Trust for his individual account and may exercise all rights as a Shareholder. Any Trustee or officer may have personal business interests and may engage in personal business activities, provided the same do not directly compete with the actual business being conducted by the Trust. Subject to the provisions of this Declaration, any Trustee or officer may have a direct or indirect interest in a Person who renders advice or services to the Trust and may receive compensation from such Person as well as compensation as Trustee, officer or

otherwise hereunder. None of these activities shall be deemed to conflict with his duties and powers as Trustee or officer.

(b) Subject to the provisions of paragraph 7.4(a), the Trustees may not, directly or indirectly, purchase or otherwise acquire any property whatsoever from, or sell or otherwise transfer any property whatsoever to, any Trustee in his individual capacity, or any officer, employee, investment advisor, manager, or independent contractor of the Trust. Nor may the Trustees lend any of the assets or property of the Trust to any Trustee, in his individual capacity, or any officer or employee of the Trust. For the purposes of this section, the term "independent contractor" means an "independent contractor" as defined in Section 856(d)(3) of the Internal Revenue Code of 1954, which furnishes or renders services to tenants of, or manages or operates, Real Property owned by the Trust.

(c) The Trustees shall not knowingly, directly or indirectly purchase or otherwise acquire any property whatsoever from, or sell or otherwise transfer any property whatsoever to, or lend any of the assets or property of the Trust to, the Manager, any Person affiliated with the Manager or any other Person with which a Trustee, in his individual capacity, is affiliated by reason of being a director, officer, partner, trustee, venturer or holder of more than one-half (1/2) of one percent (1%) of the outstanding capital stock of or other interest in such other Person, unless (i) such transaction has been approved or ratified by the affirmative vote of a majority of the Trustees, including a majority of the Trustees not so affiliated and to whom the interest or connection with such transaction has been disclosed or was known; (ii) the

terms of such transaction are fair and reasonable to the Shareholders of the Trust at the time of such transaction and under the circumstances then prevailing; and (iii) such transaction relates to (A) the acquisition of Mortgage Loans on terms not less favorable to the Trust than similar transactions involving unaffiliated parties or (B) the acquisition by the Trust of other property at prices not exceeding the fair value thereof as determined by independent Appraisal or the disposition of Trust property at not less than the fair value thereof as determined by independent Appraisal; and (iv) such transaction relates to the purchase or acquisition of Mortgage Loans or other property from or the sale or disposition of Mortgage Loans or other property to a proposed real estate investment trust to be managed by a Person affiliated with the Manager, which real estate investment trust shall have as its principal investment objective the acquisition, ownership and disposition of real estate equities and other interests in real property (the "Equity Trust"). For purposes of the immediately preceding sentence a Person shall be deemed to be affiliated with the Manager if such Person, or any officer, director, partner, trustee or holder of more than one-half (1/2) of one per cent (1%) of the capital stock of such Person, is an officer, director, partner or holder of more than one-half (1/2) of one percent (1%) of the capital stock of the Manager.

(d) The prohibitions set forth above shall not affect the right of the Trust to acquire participations in First Mortgage Loans on terms not less favorable than those at which such participations are sold to any Person not affiliated with the Trust, as the term affiliated is defined in subparagraph (c) above, nor shall this prohibition affect

the right of the Trust to sell participations in First Mortgage Loans on terms no more favorable than those at which the Trust participates.

(e) This paragraph 7.4 shall not prevent the sale to a Trustee of Shares, notes, bonds, debentures or other Securities issued by the Trust for the public offering thereof in accordance with a Registration Statement filed with the Securities and Exchange Commission under the Securities Act of 1933, as amended, nor shall it prevent the payment to a Trustee of commissions or fees for the so-called "private placement" of such Securities with investors. Nothing herein shall prevent the Trustees from forming a corporation, partnership, trust or other business association owned by the Trustees or by their nominees for the purpose of holding title to property of the Trust or managing property of the Trust.

(f) The Trustees and the Manager are authorized to execute such agreements with the Equity Trust and its advisor as shall, among other things provide as follows:

(i) Any investments or investment opportunities which fall within the principal investment objective of the Trust and within the investment policies adopted from time to time by the Trustees and which are presented to the Manager or any Person affiliated with the Manager (including the advisor to the Equity Trust), shall first be presented to the Trust for acceptance or rejection by the Trustees and no such investment shall be acquired by the Manager or any Person affiliated with the Manager or presented by any of the foregoing to any Person until after a majority of the Trustees, including a majority of the Trustees who are neither personally interested or affiliated with such advisor, have rejected such investment. Any investments or

investment opportunities which fall within the principal investment objective of the Equity Trust and within the investment policies adopted from time to time by the Trustees of the Equity Trust and which are presented to the Manager or any Person affiliated with the Manager, shall first be presented to the Equity Trust for acceptance or rejection by the Trustees of the Equity Trust and no such investment shall be acquired by the Trust, the Manager or any Person affiliated with the Manager until after a majority of the Trustees of the Equity Trust, including a majority of such Trustees who are neither personally interested or affiliated with the Manager, have rejected such investment.

(ii) In the event that any investment or investment opportunity falls within the principal investment objectives of both the Trust and the Equity Trust (herein collectively called the "Trusts") and within the investment policies adopted by the Trustees of both Trusts, the same shall be offered to both Trusts for acceptance or rejection by a majority of the Trustees, including a majority of the Trustees of each Trust who are not affiliated with the other Trust or the advisor or manager of either Trust ("Independent Trustees"). In the event the Independent Trustees of each Trust approve such investment or a participation therein, each Trust shall participate in such investment in such amounts and on such terms and conditions as the Independent Trustees shall find to be fair and reasonable and in the best interests of their respective Shareholders. If the Independent Trustees of each Trust are unable to agree on the amount of their participation in such investment, the fraction of such investment to be allocated to each Trust shall be

determined by dividing the Common Assets of such Trust by the sum of the Common Assets of each Trust. The term "Common Assets" shall mean the Book Value of that portion of the Total Assets of each Trust comprising the type represented by such proposed investment. The term "Book Value" shall mean the value of an asset on the books of such Trust before provision for amortization, depreciation or depletion and before deducting any indebtedness or other liability or reserve in respect thereof. Funded and unfunded Commitments to make Mortgage Loans shall be included at the lesser of fair market value (in the judgment of the Trustees of such Trust) or cost.

(ii) For purposes of this subparagraph (f), a Person shall be deemed to be affiliated with the Manager, or the advisor of the Equity Trust, if such Person, or any officer, director, partner, trustee or holder of more than one-half (1/2) of one per cent (1%) of the capital stock of such Person, is an officer, director, partner or holder of more than one-half (1/2) of one percent (1%) of the capital stock of the Manager, or the advisor of the Equity Trust, as the case may be.

(v) The authority granted in this subparagraph (f) shall expire and be of no further force and effect upon the failure of the initial registration statement (to be filed by the Equity Trust with the securities and Exchange Commission) to become effective in accordance with the Securities Act of 1933.

7.5 Restriction of Duties and Liabilities. To the extent that the nature of this Trust will permit, the duties and liabilities of Trustees and officers shall be the same as the duties and liabilities of directors and officers of a Massachusetts corporation.

7.6 Persons Dealing With Trustees or Officers. Any act of the Trustees or officers purporting to be done in their capacity as such shall, as to any persons dealing with such Trustees or officers, be conclusively deemed to be within the purposes of the Trust and within the powers of the Trustees and officers. No Person dealing with the Trustees or the authorized officers, agents or representatives of the Trust shall be bound to see to the application of any funds or property passing into their hands or control. The receipt of the Trustees or any of them or of authorized officers, agents or representatives of the Trust for moneys or other consideration shall be binding upon the Trust.

ARTICLE VIII

Duration, Amendment, Termination and Qualification of Trust

8.1 Earlier Termination. Subject to possible earlier Termination in accordance with the provisions hereof, the Trust shall terminate upon the expiration of twenty (20) years after the death of the last survivor of the following named persons:

Name	Child of	Address	Birth Date
Brian Charles Barren	Daniel James Barren	164 Dodds Lane Princeton, N.J.	11/8/63
Emilie Rogerson Cox	Charles W. Cox	47 Crescent Place Short Hills, N.J.	8/6/65
Thomas Lyon Cox	Charles W. Cox	47 Crescent Place Short Hills, N.J.	12/16/66
Elizabeth Chambers Kellogg	James C. Kellogg	1 Essex Road Summit, N.J.	2/1/69
Robin Adair Milam	Arthur W. Milam	1550 Lancaster Terrace Jacksonville, Florida	12/21/54
Kristen Lee Morrell	Hugh Morrell	44 Old Oak Drive Summit, N.J.	7/19/63

Lisa Ann Schroeder	Frederick D. Schroeder	8 Peter Cooper Road New York, N.Y.	7/10/63
David John Strupp, Jr.	David J. Strupp	Holly Lane Rye, N.Y.	1/20/69
Karen Elizabeth Wickersham	Ralph Wickersham	4603 Queen Lane Jacksonville, Florida	10/25/64
Amy Lynn Goetz	Donald L. Goetz	3602 Leewood Lane Jacksonville, Florida	5/9/69

8.2 Termination of Trust. The Trust may be terminated by the affirmative vote of the holders of a majority of all outstanding Shares entitled to vote thereon at any meeting of Shareholders. Upon the termination of the Trust:

(a) The Trust shall carry on no business except for the purpose of winding up its affairs.

(b) The Trustees shall proceed to wind up the affairs of the Trust and sell, convey, assign, exchange, transfer or otherwise dispose of the Trust Estate on such terms and conditions as they shall determine, pay its liabilities and do all other acts appropriate to liquidate its business; provided that any sale, conveyance, assignment, exchange, transfer or other disposition of more than fifty percent (50%) of the Trust Estate shall require approval of the principal terms of the transaction and the nature and amount of the consideration by vote or consent of the holders of a majority of all the outstanding Shares entitled to vote thereon.

(c) After paying or adequately providing for the payment of all liabilities, and upon receipt of such releases, indemnities and refunding agreements as they deem necessary for their protection, the Trustees shall distribute the remaining Trust Estate, in cash or in kind or partly in each, among the Shareholders according to their respective rights and, upon execution of an instrument setting forth the fact of such termination, the Trustees

shall thereupon be discharged from all further liabilities and duties hereunder and the rights and interests of all Shareholders shall thereupon cease.

8.3 Amendment.

(a) This Declaration may be amended by Shareholders holding a majority of the outstanding Shares entitled to vote thereon (except as to the limitations of the personal liability of Trustees and Shareholders and the prohibition of assessment upon Shareholders). The Trustees may also amend this Declaration without the vote or consent of Shareholders if they deem it necessary to conform this Declaration to the requirements of the REIT Provisions (in the event the Trust is being operated in a manner to comply with the REIT Provisions) or to other applicable federal laws or regulations, but the Trustees shall not be liable for failing so to do.

(b) No amendment may be made, under subparagraph 8.3(a) above, which would change any rights with respect to any outstanding Shares by reducing the amount payable thereon upon liquidation of the Trust or by diminishing or eliminating any voting rights pertaining thereto, or which would amend this sub-paragraph 8.3(b) except with the vote or consent of the holders of two-thirds (2/3) of the outstanding Shares entitled to vote thereon.

(c) Notwithstanding any other provisions hereof, until such time as a Registration Statement under the Securities Act of 1933, as amended, covering the first public offering of Shares of the Trust shall have become effective, the Trust may be terminated or amended in any respect by the Trustees.

(d) No amendment to the Declaration shall become effective until it has been filed in the office of the Secretary of State, Commonwealth of Massachusetts, the office of

the clerk of the city or town in which the Trust at the time has its principal office, and such other places as may be required at the time by Massachusetts law.

8.4 Savings Clause. In the event the Trust is being operated in a manner to comply with the REIT Provisions, the provisions of Section 2.1 and Section 8.3 giving the Shareholders the right to elect Trustees and the right to amend and terminate the Trust shall be subject to the requirements of the REIT Provisions; if any provision granting or limiting such Shareholders' rights shall conflict with the requirements of the REIT Provisions, such provision shall be deemed to be void and without any force or effect *ab initio*, but any action taken pursuant to any such provision shall have been validly taken upon the vote of the Trustees required hereunder. In the event that the provision relating to the election of Trustees by the Shareholders of the Trust shall be deemed to be without force or effect, the Trustees then in office shall be deemed to be the qualified and acting Trustees until such time as the successor Trustees have been named and qualified; provided, however, that at the next meeting of Shareholders after the Trustees shall have notified the Shareholders that any or all of the Shareholders' rights under Section 2.1 or 8.3 created such a conflict and therefore shall be without force and effect, there shall be submitted to the Shareholders for their approval or disapproval by a majority of those voting, the question as to whether such Shareholders' right or rights should be continued.

ARTICLE IX

Definitions

The following terms shall, unless the context otherwise requires, have the respective meanings hereinafter specified when used in this Declaration: In this Declaration, words in the singular number include the plural and in the plural number include the singular.

(a) *Appraisal.* "Appraisal" shall mean the determination of fair market value as of the date of the appraisal of Real Property in its existing state or in a state to be created as determined by the Trustees or by a disinterested person having no economic interest in the Real Property who in the sole judgment of the Trustees or the Manager is properly qualified to make such a determination.

(b) *Construction Loans.* "Construction Loans" shall mean Mortgage Loans incurred to finance all or part of the cost of acquiring and improving land and the construction or improvement of dwellings or other buildings thereon.

(c) *Declaration.* "Declaration" shall mean this Declaration of Trust and all amendments or modifications thereof.

(d) *Development Loans.* "Development Loans" shall mean Mortgage Loans incurred to finance all or part of the cost of acquiring and improving vacant land and developing it into a site or sites suitable for the construction of dwellings and other structures or suitable for other residential, commercial, industrial or public uses.

(e) *First Mortgage Loans.* "First Mortgage Loans" shall mean Mortgages which take priority or precedence over all other charges or encumbrances upon the same Real Property and which must be satisfied before such other charges are entitled to participate in the proceeds of any sale. Such Mortgage may be upon a lessee's interest in Real Property. Such priority shall not be abrogated by

liens for taxes, assessments which are not due or remain payable without penalty, contracts (other than contracts for repayment of borrowed moneys), or leases, mechanics' and materialmen's liens for work performed and materials furnished which are not in default or are in good faith being contested and other claims normally deemed in the same local jurisdiction not to abrogate the priority of a First Mortgage Loan.

(f) *Gap Commitment.* "Gap Commitment" shall mean an undertaking by which a Person agrees to fund the difference between the minimum amount which a permanent lender has agreed to fund and the maximum amount which such permanent lender would fund if certain occupancy or rental requirements are met.

(g) *Manager.* "Manager" shall mean the Person employed by the Trustees under the provisions of Article IV.

(h) *Mortgage Loans.* "Mortgage Loans" shall mean notes, debentures, bonds and other evidences of indebtedness or obligations which are negotiable or non-negotiable and which are secured or collateralized by Mortgages.

(i) *Mortgages.* "Mortgages" shall mean mortgages, deeds of trust or other security deeds on Real Property or rights or interests in Real Property.

(j) *Net Assets.* "Net Assets" shall mean the Total Assets of the Trust without deducting therefrom any liabilities of the Trust except that depreciable assets shall be included therein at the lesser of either (i) the cost of such assets on the books of the Trust less depreciation thereof on a straight-line basis over the useful life of such assets in accordance with generally accepted accounting principles, and in making such calculations the useful life of such assets shall correspond to the useful life used as the basis of depreciation on the Trust's federal income tax returns or (ii) fair market value of such assets in the judgment of the Trustees.

(k) *"Operating Expenses."* "Operating Expenses"

shall mean the aggregate annual Operating Expenses of the Trust in accordance with generally accepted accounting principles, as determined by independent certified public accountants selected by the Trustees, exclusive of the following: the cost of borrowed money; taxes on income and taxes and assessments on real property and all other taxes applicable to the Trust; legal, audit, accounting, underwriting, brokerage, listing, registration and other fees, printing, engraving, advertising and other expenses and taxes incurred in connection with the issuance, distribution, transfer, registration and stock exchange listing of the Trust's securities; fees and expenses paid to Trustees who are not affiliates of the Manager, independent advisers, independent contractors, mortgage servicers (other than the Manager and its affiliates), consultants, managers and other agents employed by or on behalf of the Trust; expenses connected with the acquisition, disposition and ownership of real estate interests or mortgage loans or other property (including the costs and expenses of foreclosure, title insurance and abstract expenses, insurance premiums, legal services, brokerage and sales commissions, maintenance, repair and improvement of property); expenses of owning, operating, maintaining and managing real estate equity interests; expenses (including licenses, fees and commissions) of doing business, both organizationally and operationally, in the various states and other jurisdictions in which the Trust makes investments or otherwise conducts operations; expenses of revising, amending, modifying, or terminating this Declaration of Trust; expenses connected with payments of dividends or interest or distributions in cash or any other form made or caused to be made by the Trustees to holders of securities of the Trust; expenses connected with meetings of Trustees and Shareholders of the Trust, communications to holders of securities of the Trust and advertising, public relations, bookkeeping and clerical expenses incurred in maintaining relations with holders of securities, including

the cost of preparing, printing and mailing certificates for securities, proxy solicitation materials and reports to holders of the Trust's securities; fees and charges of transfer agents, registrars, indenture trustees, warrant agents and depositaries; fees and expenses of independent certified public accountants employed by the Trust to audit the books and records of the Trust, render opinions in connection therewith and perform all other accounting services for the Trust; cost of insurance as required by the Trustees (other than Trustees' liability insurance); provisions for depreciation, depletion, amortization and losses on the disposition of assets and provisions for such losses.

(1) *Person*. "Person" shall mean and include individuals, corporations, limited partnerships, general partnerships, joint stock companies or associations, joint ventures, associations, trusts, banks, trust companies, land trusts, business trusts or other entities and governments and agencies and political subdivisions thereof.

(m) *Real Property*. "Real Property" shall mean and include land, rights in land, leasehold interests (including but not limited to interests of a lessor or lessee therein), and any building, structures, improvements, furnishings, fixtures and equipment located on or used in connection with land, leasehold interests and rights in land or interests therein but does not include Mortgages, Mortgage Loans or interests therein.

(n) *REIT Provisions*. "REIT Provisions" shall mean Part II, Subchapter M of Chapter 1 of Subtitle A of the Internal Revenue Code of 1954 as now enacted or hereafter amended, or successor statutes and the Treasury Regulations from time to time promulgated thereunder.

(o) *Securities*. "Securities" shall mean any stock, shares, voting trust certificates, bonds, debentures, notes or other evidences of indebtedness or, in general, any instruments commonly known as "securities" or any certificates of interest, shares or participations in temporary or interim certificates for, receipts for

guarantees of, or warrants, options or rights to subscribe to, purchase or acquire any of the foregoing.

(p) *Shareholders*. "Shareholders" shall mean, as of any particular time, all holders of record of outstanding Shares at such time.

(a) *Shares*. "Shares" shall mean the shares of beneficial interests of the Trust as described in Article VI.

(r) *Stand-By Commitment*. "Stand-By Commitment" shall mean an undertaking executed at the time of making of a Construction or Development Loan, under which a permanent lender agrees, upon the completion of such construction or development and/or the fulfillment of other conditions, to purchase or provide for the payment of such Construction or Development loans.

(s) *Total Assets of the Trust*. "Total Assets of the Trust" shall mean the value of all of the assets of the Trust Estate as such value appears on the most recent quarterly balance sheet of the Trust available to the Trustees.

(t) *Trust Estate*. "Trust Estate" shall mean, as of any particular time, all or any part of the property, real, personal or otherwise, tangible or intangible, which is transferred, conveyed or paid to or owned by the Trust or the Trustees in their capacities as Trustees hereunder, and all rents, income, profits and gains therefrom and which at such time is owned or held by the Trust or the Trustees in their capacities as Trustees hereunder.

(u) *Trustees' Regulations*. "Trustees' Regulations" shall mean the regulations or by-laws for the conduct of the business and affairs of the Trust adopted by the Trustees concurrently with or immediately after the execution of this Declaration and all amendments or modifications thereto.

(v) *Wrap-Around Loans*. A "Wrap-Around Loan" shall mean a Mortgage Loan under which the Trust is permitted to make the payment of an existing First Mortgage Loan and advances additional funds to the borrower, taking in return a Mortgage Loan secured by a Mortgage in an amount equal to the total unpaid principal

balance of the existing First Mortgage Loan, plus the amount of additional funds actually advanced.

(w) **Junior Mortgage Loans.** "Junior Mortgage Loans" shall mean Mortgages which (1) have the same priority or precedence over all charges or encumbrances upon Real Property as that required for a First Mortgage Loan except that they are subject to the priority of one or more other Mortgages and (2) which must be satisfied before such other charges or encumbrances (other than prior Mortgages) are entitled to participate in the proceeds of any sale or other disposition of such Real Property.

ARTICLE X

Miscellaneous

10.1 Applicable Law. This trust has been executed by the Trustees in the Commonwealth of Massachusetts to take effect therein and the rights of all parties and the construction and effect of every provision hereof shall be subject to and construed according to the laws of the Commonwealth of Massachusetts.

10.2 Successors in Interest. This Declaration and the Trustees' Regulations shall be binding upon and inure to the benefit of the undersigned Trustees and their successors, assigns, heirs, distributees and legal representatives and every Shareholder and his successors, assigns, heirs, distributees and legal representatives.

10.3 Inspection of Records. Trust records shall be available for inspection by Shareholders at the same time and in the same manner and to the extent that comparable records of a Massachusetts corporation would be available for inspection by shareholders under the laws of the State of Massachusetts. Any federal or state securities administration or other similar authority shall have the right, at

reasonable times during business hours and for proper purposes, to inspect the books and records of the Trust.

10.4 Conflicts with Applicable Law. In the event that the Trust is being operated in a manner to comply with the REIT Provisions, if any provision hereof shall conflict with the REIT Provisions, the same shall be deemed never to have constituted a part of the Declaration; provided, however, none of the remaining provisions of this Declaration and no action taken or omitted prior thereto shall be affected or impaired thereby. A certification signed by a majority of the Trustees setting forth their determination that such conflict exists shall be conclusive evidence of such determination. The Trustees shall not be liable for failure to make any determination. Nothing herein shall limit or affect the right of the Trustees to amend this Declaration as provided elsewhere.

If any provisions of this Declaration shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect or impair any other provision of this Declaration.

10.5 Certifications. Any certificates executed by a Trustee concerning the number or identity of Trustees or Shareholders, that the execution of any instrument or writing has been duly authorized, that any vote at a meeting of the Trustees or Shareholders was duly taken, that the number of Trustees or Shareholders present at any meeting or executing any written instrument satisfies the requirements of this Declaration, concerning the form of any regulation or by-law adopted by or the identity of any officer elected by the Trustees, or concerning the existence or nonexistence of any fact or facts which in any manner relate to the affairs of the Trust shall be conclusive evidence as to the matters so certified in favor of any Person dealing with the Trustees.

10.6 Recording and Filing. A copy of this Declaration

and any amendments shall be filed in the office of the Secretary of State, Commonwealth of Massachusetts, in the office of the City Clerk, Boston, Massachusetts and such other places as shall be required by Massachusetts law. This Declaration and any amendments may also be filed or recorded in such other places as the Trustees deem appropriate.

10.7 Counterparts. This Declaration may be executed in several counterparts, each of which when so executed shall be deemed to be an original, and such counterparts, together, shall constitute but one and the same instrument, which shall be sufficiently evidenced by any such counterpart.

10.8 Headings For Reference Only. Headings preceding the text of the articles and sections hereof have been inserted solely for convenience and reference and shall not be construed to affect the meaning, construction or effect of any provision of this Declaration.

We, Jack H. Quaritius, President and Arthur W. Milam, Secretary of Fidelity Mortgage Investors hereby certify that the above amended and restated Declaration of Trust was approved by unanimous vote of the shareholders of the Trust at a meeting duly called and held on October 20, 1969.

In Witness Whereof, the undersigned have executed this amended and restated Declaration of Trust in Boston, Massachusetts as of October 20, 1969.

/s/ Jack H. Quaritius
/s/ Arthur W. Milam